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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1922

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY (a corporation), *Plaintiff in Error,*
vs.
A. J. PARRINGTON, *Defendant in Error.*

No. 573

JAMES C. DAVIS, Agent, United States Railroad Administration, *Plaintiff in Error,*
vs.
A. J. PARRINGTON, *Defendant in Error.*

UPON WRITS OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF AMICI CURIAE ON BEHALF OF DEFENDANTS IN ERROR.

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UPON WRITS OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF AMICI CURIAE ON BEHALF OF DEFENDANTS IN ERROR.

This brief is filed pursuant to permission granted by the Court. We shall discuss only two points made in the brief of plaintiffs in error, viz., the points made at pages 59 and 68 respectively. These points are as follows:

> *If section 4 applies to shipments wholly by water, was it violated?*
>
> *The measure of damages is not the difference between the rates. No other evidence of damage was offered so there can be no recovery.*

REPLY TO ARGUMENT THAT SECTION 4 WAS NOT VIOLATED.

The contention here is that section 4 was not violated because no shipments of sugar were in fact made to North Portland, the more distant point.

After quoting the language of the Fourth Section counsel say "a carrier cannot 'receive' more for the short haul than the long, without actually collecting charges for both."

Obviously the section means that carriers shall not charge or receive more for the less distance than they charge or receive for the greater distance.

In *Southern Pacific Company v. California Adjustment Company*, 237 Fed. 960 (C. C. A.) the Circuit Court of Appeals for the Ninth Circuit, in construing the long and short haul clause of the Constitution of California, said:

> "The effect of the constitutional provision is to fix a measure of charge and that measure is the charge which is actually made for the

longer haul. Any charge in excess of that for a shorter haul is by the amount of the excess illegal, and each violation of that provision furnishes the measure of the shipper's damage therefor."

The provision of the California Constitution is identical with the provision of the Fourth Section. In the case of *California Adjustment Company v. A. T. & S. F. Ry. Co.*, 179 Cal. 140, 153, this same contention was made and overruled. The decision was by the Supreme Court in bank and all of the Justices concurred. The Court said:

"Nor do we think it material whether, when the shipments to intermediate points complained of as excessively charged for were made, no contemporaneous shipment to the more distant point was made. Under the constitutional provision the legitimate maximum charge for the shorter haul is the charge the carrier makes for the longer one, and it is only necessary to show in proof of an illegal discrimination that the shipper paid a larger sum for the short haul than the defendant would have charged for the longer one. Actual shipment for the longer distance is not required to be shown. All that is required is a showing that the defendant held out and published to the shipping world that it would charge certain rates for the transportation of a certain class of merchandise from San Francisco to Los Angeles. This was shown, and, when shown, for the purpose of determining whether discrimination was practiced or not, the rates so held out to be charged are deemed in law to have been charged."

If the construction contended for by defendant in error were correct, chaos would result. The uniformity and certainty of rates which is one of the cardinal objects of the Interstate Commerce Act would be destroyed. Before a shipper to Portland, for example, could ascertain what he should pay for a shipment of sugar, he would have to make an investigation to see whether the carrier ever actually transported a similar shipment to North Portland. And it may be asked: Would it be sufficient to show that such a shipment moved two years before or one year before or would the shipper be required to show that it moved at the same time? Or would it be sufficient to show that such a shipment moved subsequently to the plaintiff's shipment?

And if proof of a subsequent shipment was sufficient, would a shipper be obliged to wait until such subsequent shipment was made before his cause of action accrued? In such event the charges, lawful when paid, would be rendered unlawful by a subsequent act of the carrier.

Assume that one merchant in Portland shipped his sugar from Oakland and that another shipped it from San Francisco. Assume further that the merchant who shipped from Oakland could show an actual shipment of sugar from Oakland to North Portland, whereas the merchant who shipped from San Francisco was unable to show such a shipment to North Portland. The result would be that the

merchant shipping from Oakland would receive the benefit of the lower North Portland rate, whereas the San Francisco shipper would not. If such were the law all that a shipper would have to do in order to obtain the benefit of the lower rate to the more distant point would be to ship a hundred pounds of the same commodity to that point or procure some friend to make such a shipment. By such a subterfuge he would obtain the benefit of the lower rate on all his shipments of sugar while his competitor who shipped his sugar from another point, but who did not resort to the subterfuge, would be compelled to pay the higher rate.

We do not think that defendant in error would have made this contention if its counsel had given the matter any serious thought or attempted to follow the argument to its logical conclusion.

As stated above, one of the cardinal objects of our railroad legislation is to insure the certainty of rates. Under our law there can be no uncertainty or obscurity in such a matter. A tariff specifying a lower rate to a more distant point is to be read as specifying that rate to all intermediate points where the rate to the intermediate points specified in the tariff exceeds the rate specified to the more distant point. In precisely the same way a tariff specifying two intermediate rates which total less than the long haul rate will be construed to make the sum of the intermediate rates the rate to the long haul point. It is simply a matter of tariff construction.

In *Louisville & N. Ry. Co. v. Walker*, 110 Ky. 961 (63 S. W. 20), *supra*, the Supreme Court of Kentucky said:

> "Cave City and Glasgow Junction are stations on appellant's road between Bowling Green and Louisville, and at the time of these shipments appellant charged 20 cents a hundred pounds for transporting tobacco from Bowling Green to Louisville. Glasgow is 10 miles from Glasgow Junction, and is on a branch road running out from the main line at Glasgow Junction. Appellant charged 6 cents a hundred pounds for transporting tobacco from Glasgow to Glasgow Junction, and 30 cents for transporting it from Glasgow Junction to Louisville. Appellee filed this action in February 24, 1899, *to recover for the excess charged him for the short haul over and above the amount charged for the longer haul* from Bowling Green, and recovered judgment for $205.32. It is insisted for appellant that the action does not lie, and that there can be no recovery, because it does not appear that appellee has been damaged. In *Hutchinson v. Railroad Co.*, 57 S. W. 25, we held that the action could be maintained, and, upon a reconsideration of the question, adhere to the ruling in that case. *If a carrier charges a shipper more than the law allows him to charge, the excess so paid may be recovered by the shipper.* If there had been a statute fixing the charge from Cave City to Louisville at 20 cents, and appellant had charged 29 cents, the excess so paid above the legal rate might be recovered, on the ground that it had been illegally exacted. Section 218 of the constitution is in these words: 'It shall be unlawful for any person or corporation owning or operating a railroad in this state, or any common carrier, to charge or receive any greater compensation in the aggregate, for the

transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, or person, or corporation, owning or operating a railroad in this state, to receive as great compensation for a shorter as for a longer distance: provided, that upon application to the railroad commission, such common carrier, or person, or corporation, owning or operating a railroad in this state, may in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers, or property; and the commission may, from time to time, prescribe the extent to which such common carrier, or person, or corporation, owning or operating a railroad in this state, may be relieved from the operation of this section.' When the constitution was formed there was great complaint that local shippers, who had no other means of getting their goods to market, were sometimes made to pay more than their just share of the cost of transportation, and that while at competitive points, where competition rendered it necessary, the rates were reasonable, at intermediate points along the line, where there was no competition, extortion was practiced. The section quoted was designed to protect these people who were, so to speak, in the power of the carrier, having no other way to get to market. It was not designed for the protection of the long haul. Experience had shown that, by reason of competition and other circumstances, the shippers over the long haul were not so much in need of protection. *As one means of protecting the local shipper, this section fixed a maximum*

limit, beyond which he should not be charged. It was thus made unlawful for the carrier to charge a greater compensation for the same service for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance. *When the charge for the longer haul is fixed, to charge more for the shorter haul is just as clearly illegal as it would be to charge a greater sum than the law allowed where the law itself fixed a sum certain as the limit of the charge. The carrier is allowed by the constitution to fix the rate for the longer haul, but when he so fixes it this rate is the limit, beyond which he cannot go in charging for the same service in the shorter haul.* And when appellant exacted of appellee more than it could legally charge, his right to recover the excess so paid is precisely similar to the right to recover for any other illegal exaction. He whose money is taken from him illegally is to that extent damaged. It is not necessary for appellee to show anything more than that he was compelled to pay more than appellant had a right to charge."

In *Junod v. Chicago & N. W. Ry. Co.*, 47 Fed. 290, *supra*, Judge Shiras instructed the jury as follows:

"In the second count of the petition it is substantially charged that between the 17th of February, 1888, and the 1st of March, 1888, inclusive, the defendant company had in force a tariff rate for which it carried corn and oats from Blair and other points in Nebraska, over its line in Iowa, passing through Carroll, Iowa, to Chicago, Ill., and thence to New York, at the rate of 36½ cents per 100 pounds; that the plaintiffs, between the dates aforesaid, had at Carroll, in the state of Iowa, for shipment east,

64,250 pounds of grain; that the defendant company demanded for shipping grain to New York from Carroll, Iowa, the sum of 46½ cents, or 10 cents more per 100 pounds than it was then charging for the like service to shippers from Blair and other points in Nebraska; that by reason of these facts the plaintiffs were compelled to ship the grain aforesaid to Chicago, Ill., paying therefor at the rate of 19 cents per 100 pounds; and by reason of these facts the plaintiffs are seeking to recover the damages alleged against the defendant company. * * * If a party, under the law, is entitled to have the same rate,—that is, if the shipper at Carroll, Iowa, was entitled to have the same rate charged him for the forwarding of his property from Carroll, Iowa, to Chicago, Ill., as the shipper at Nebraska, and he was charged more,—the damage to him is the difference between the rates that he was thus called upon to pay and the lesser rate charged the Nebraska shipper. If the tariff rate from Blair and other points in Nebraska was 11 cents, and the plaintiffs had to pay 19 cents; if, under the law, as I have instructed you, the duty and obligation was on the railway company to give the benefit to the shippers at Carroll, Iowa, of the same rate,—of an equal rate with that given to the shippers from Blair and other points in Nebraska,—you see the damage to the parties who have been compelled to pay this higher rate is the difference between that and the lesser rate. If, for every 100 pounds they were compelled to pay 8 cents more, that is the damage per 100 pounds of grain shipped that is caused them."

The Court did not hold that it was incumbent upon the plaintiff to show that any shipments had moved from the Nebraska points, it being sufficient

that the defendant's tariff specified lower rates from such points.

We might quote from other decisions to the same effect, but we deem it unnecessary. In no decision of any court, so far as we have been able to discover, involving a violation of a long and short haul prohibition, was it even intimated that it was necessary for the plaintiff to show an actual movement of the same kind of freight for the longer distance at a lower charge. It has always been held sufficient for the plaintiff to show that the railroad maintained the lower rate for the longer distance.

This is the simple case of an *overcharge;* the statute fixes the charge to the more distant point as the maximum charge to the less distant point. And if a carrier charges more than such maximum charge the shipper is overcharged to the extent of the excess.

Counsel cite *Parsons v. C. & N. W. Ry. Co.*, 167 U. S. 447, in support of their contention.

Instead of supporting the position of plaintiffs in error that case is authority to the effect that the assignors of defendants in error are entitled to recover the difference between the higher charges paid by them for the shorter distance and the lower rate charged by the carrier for the longer haul.

The *Parsons* case was an action to recover damages for a violation of the long and short haul clause of the 4th Section of the Interstate Com-

merce Act before the amendment to that section on June 18, 1910. The trial Court sustained a demurrer to the complaint on the ground that the complaint did not show a violation of the long and short haul clause of the act, and this judgment was affirmed by the Circuit Court of Appeals. The judgment of the Circuit Court of Appeals was affirmed by this Court upon the ground that the complaint stated no violation of the long and short haul clause of the act. *This Court said, however, that if there had been a violation of the long and short haul clause the plaintiff would have been entitled to recover the difference between the rate which he had paid and the lesser rate for the greater distance.* This Court said:

> "If he had shipped to New York and been charged local rates he might have recovered any excess thereon over through rates. He did not ship to New York and yet seeks to recover the extra sum he might have been charged if he had shipped."

The plaintiff in the *Parsons* case shipped corn from Iowa points to Chicago. The complaint did not show that the rates from Nebraska points to Chicago were lower than the rates paid by plaintiff; nor did it show that the rate charged plaintiff from Iowa points to Chicago was greater than the through rate charged from Nebraska points to New York and other places on the Atlantic seaboard. This Court said:

> "There is nothing, therefore, to show that the local rate charged plaintiff from the Iowa

> place of shipment to Chicago was greater than the through rate charged from Nebraska to the four places on the seaboard, or greater than that charged for like shipments from his place of shipment to the same four places."

The decision of this Court in the *Parsons* case shows that the Court deemed the measure of damages under the Interstate Commerce Act, in case of a violation of the long and short haul clause, to be the excess over the charge that would have been collected had there been no violation of the act.

In every case where the question has come before the higher Courts it has been held that for a violation of the long and short haul clause the shipper to the less distant point is entitled to recover the difference between the rate paid by him and the lower rate charged to the more distant point.

It was so held in each of the following cases where the matter was directly involved:

Parsons v. C. & N. W. Ry. Co., 167 U. S. 447, *supra*;

Southern Pacific Co. v. California Adj. Co., 237 Fed. 954 (C. C. A.);

California Adjustment Co. v. A. T. & S. F. Ry. Co., 179 Cal. 140;

Louisville & N. Ry. Co. v. Walker, 63 S. W. 20 (110 Ky. 961);

Hutchinson v. R. R. Co., 57 S. W. 25 (Ky.);

Twells v. Penn. R. R. Co., 2 Walker 450 (3 Am. Law Reg. N. S. 728) (Penn. Supreme Court).

It was so held in each of the following cases decided by the lower Courts:

Junod v. C. & N. W. Ry. Co., 47 Fed. 290;
Osborne v. C. & N. W. Ry. Co., 48 Fed. 49;
California Adjustment Co. v. S. P. Co., 226 Fed. 349.

The long and short haul provision of the Constitution of California as adopted in 1879 was taken from the Constitution of Pennsylvania of 1873 (Sec. 3, Article XVII) and that provision of the Pennsylvania Constitution was taken from an Act of the Legislature of Pennsylvania (March 7, 1861, P. L. 88) which provided that the local rates from Pittsburg and Philadelphia to intermediate points should at no time exceed the rate from Pittsburg to Philadelphia or from Philadelphia to Pittsburg. (*Central Iron Works v. P. R. R.*, 17 Pa. Ct. 652.)

In *Central Iron Works v. P. R. R.*, 17 Pa. Ct. 652, *supra*, decided under the provisions of the Constitution of Pennsylvania, the Court held that a person who was charged more for the shorter haul could maintain concurrently an action at law to recover the *overcharge* and a suit in equity to enjoin the carrier from thereafter making a greater charge for the shorter haul.

REPLY TO CONTENTION THAT THE MEASURE OF DAMAGES IS NOT THE DIFFERENCE BETWEEN THE RATES.

This point also has been determined adversely to the contention of plaintiffs in error by every Court where such contention was made.

In *Southern Pacific Company v. California Adjustment Company*, 237 Fed. 954, 959, the Circuit Court of Appeals for the Ninth Circuit said:

> "It is contended that the plaintiff had no right of action for the recovery of the difference between the greater charge for the short haul and the lesser charge for the long haul, because no such right of action existed at common law, and no such right of action has been conferred by the Constitution or statutes of California. The defendant cites the case of *Cowden v. Pacific Coast S. S. Co.*, 94 Cal. 470, 29 Pac. 873, 18 L. R. A. 221, 28 Am. St. Rep. 142, a case in which the plaintiff sought to recover damages for discrimination in freight rates by sea between San Francisco and San Diego, alleging that the steamship company had favored a certain other shipper by charging him 12½ per cent. less than it did the plaintiff for freight on the same character and quantity of goods. The court, in view of the fact that there was no statutory or constitutional provision relating to the matter, and that there was nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate, or even gratis, and the fact that the plaintiff had not alleged that the charge made was unreasonable, held that the plaintiff had no cause of action. That conclusion was influenced largely by the decision in *Great Western R. R. Co. v. Sutton*, 4 Eng. & Ir. App. 238, a case in which Mr. Justice Blackburn had said that at common

law a person holding himself out as a common carrier of goods was not under any obligation to treat all customers equally, and that all that the law required was that he should not charge any more than was reasonable. *But in that case the court had under consideration the effect upon the common law of an act of Parliament fixing charges for railroad carriage and requiring uniformity of freight rates for goods of like description and quantity conveyed along the railway under like circumstances.* The action was for money had and received to recover charges alleged to have been improperly made against the plaintiff. Mr. Justice Blackburn said:

'The defendants may, subject to the limitations of their special acts, charge what they think fit, but not more to one person than they, during the same time, charge to others under the same circumstances. *And I think it follows from this that if the defendants do charge more to one person than they, during the same time, charge to others, the charge is, by virtue of the statute, extortionate. And I think that the rights and remedies of a person made to pay a charge beyond the limit of equality imposed by the statute on railway companies acting as carriers on their line must be precisely the same as those of a person made to pay a charge beyond the limit imposed by the common law on ordinary carriers as being more than was reasonable.*'

"This quotation from the opinion in that case is directly in point in the present case, and it marks the vital distinction between *Cowden v. Pacific Coast S. S. Co.* and the case at bar. In the case at bar the obligation to refund is not based upon the common-law rule against unreasonable charges, *but is based upon the common-law rule which requires the re-*

payment of money which has been received in violation of an express statutory obligation, as in the case of *Great Western Railroad Co. v. Sutton*. In harmony with this view is *Louisville & N. R. R. Co. v. Walker*, 110 Ky. 961, 63 S. W. 20, in which the court held that a railroad company which charges more for a short than for a long haul, in violation of the constitutional provisions of that state, is liable to the shipper for the excess charged, 'as he whose money is taken from him illegally is to that extent damaged.' And in *Louisville & Nashville Ry. Co., v. Eubank*, 184 U. S. 27, 22 Sup. Ct. 277, 46 L. Ed. 416, the court assumed without question the right of the plaintiff to sue for and recover the excess of payments made under like circumstances as in the case last cited from Kentucky.

"The difference between the case at bar and *Penna. R. R. Co. v. International Coal Co.*, 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315, and *Knudsen & Co. v. M. C. Ry.*, 148 Fed. 969, 79 C. C. A. 46, is that in those cases the damage to the plaintiff did not appear from the act of discrimination itself; the court holding that the fact that some other shipper was charged less than the lawful rate did not entitle the plaintiff to have its property transported for the same unlawful rate, and that the measure of damages did not appear upon proof alone of the discrimination. *In the case at bar the measure of damages does distinctly appear. The effect of the constitutional provision is to fix a measure of charge and that measure is the charge which is actually made for the longer haul. Any charge in excess of that for a shorter haul is by the amount of the excess illegal, and each violation of that provision furnishes the measure of the shipper's damage therefor.*"

In *California Adjustment Company v. A. T. & S. F. Ry. Co.*, 179 Cal. 140, 153, the Supreme Court of California said:

> "Under the constitutional provision the legitimate maximum charge for the shorter haul is the charge the carrier makes for the longer one, and it is only necessary to show in proof of an illegal discrimination that the shipper paid a larger sum for the short haul than the defendant would have charged for the longer one."

Here again plaintiffs in error cite *Parsons v. C. & N. W. R. R. Co.*, 167 U. S. 447, *supra*. What has been said in the foregoing part of this brief with reference to that case is also applicable here. The very quotation from the opinion of this Court which appears in the brief of plaintiffs in error shows that the case not only wholly fails to support their contention but is direct authority against it.

In the *Parsons* case the plaintiff shipped corn from certain Iowa points to Chicago. In holding that his complaint did not show a violation of the long and short haul claim this Court said:

> "There is nothing, therefore, to show that the local rate charged plaintiff from the Iowa place of shipment to Chicago was greater than the through rate charged from Nebraska to the four places on the seaboard, or greater than that charged for like shipments from his place of shipment to the same four places."

In another count of his complaint the plaintiff averred that he was entitled to damages because the

carrier did not publish its tariff. The theory of this cause of action was that if the carrier had posted its tariff at Iowa stations the plaintiff might have determined to ship his corn to the eastern points named in the tariff instead of to Chicago.

In describing this count of plaintiff's petition this Court said:

> "His argument practically is that if the tariff had been filed with the commission it might have made an order, either general or special, requiring that it be posted at the Iowa stations; that if it had been so posted he might have examined the rates and might have determined to ship his corn, not to Chicago, but to one of the four eastern points named in such tariff."

It is with reference to this count of the petition that this Court used the language quoted at page 68 of the brief of plaintiffs in error. *This count was not to recover an overcharge arising from a violation of the fourth section but was to recover damages for the failure of the carrier to publish and post the tariff in question.*

If counsel had carefully read the opinion of this Court in the *Parsons* case they would not have been cited in support of this contention. The last portion of the excerpt from the opinion quoted in the brief of plaintiffs in error is the following:

> "So, before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury. If he had shipped to New York and had been charged local rates he might have recovered any excess thereon over through

rates. He did not ship to New York and yet seeks to recover the extra sum he might have been charged if he had shipped. Penalties are not recoverable on mere possibilities."

Plaintiffs in error also cite *Pennsylvania R. R. Co. v. International Coal Co.*, 230 U. S. 184, in support of this contention. That case was also cited in support of the same contention in the case of *Southern Pacific Company v. California Adjustment Company*, 237 Fed. 954, 959 (C. C. A.), *supra*, where the Circuit Court of Appeals said:

"The difference between the case at bar and *Penna. R. R. Co. v. International Coal Co.*, 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315, and *Knudsen & Co. v. M. C. Ry.*, 148 Fed. 969, 79 C. C. A. 46, is that in those cases the damage to the plaintiff did not appear from the act of discrimination itself; the court holding that the fact that some other shipper was charged less than the lawful rate did not entitle the plaintiff to have its property transported for the same unlawful rate, and that the measure of damages did not appear upon proof alone of the discrimination. In the case at bar the measure of damages does distinctly appear. The effect of the constitutional provision is to fix a measure of charge, and that measure is the charge which is actually made for the longer haul. Any charge in excess of that for a shorter haul is by the amount of the excess illegal, and each violation of that provision furnishes the measure of the shipper's damage therefor."

In *Pennsylvania R. R. Co. v. International Coal Co.*, 230 U. S. 184, which was an action to recover

damages for rebating, this Court held that the plaintiff was entitled to damages, but that the measure of the damages was not necessarily the difference between the rate paid by plaintiff and the lower rate obtained by other shippers through a rebate. Plaintiff obtained judgment in the trial Court and the railroad company brought the case to this Court on writ of error. The plaintiff contended that as a matter of law it was entitled to recover as damages the difference between the rates which it paid and the lower rate accorded to other shippers by reason of rebates. *The plaintiff was in effect suing to obtain similar rebates.*

It appears that in the original Bill to Regulate Commerce, which passed the Senate May 12, 1886, it was provided that the carrier "should be liable to all persons who have been charged a higher rate than was charged any other person or persons, for the difference between such higher rate and the lowest rate charged upon like shipments during the same period". This provision was omitted from the act as finally passed, and this Court held that the fact of this omission was conclusive against the plaintiff's claim.

In its opinion this Court said:

> Having paid only the lawful rate, the plaintiff was not overcharged, though the favored shipper was illegally undercharged."

This Court further stated:

> "Making an illegal undercharge to one shipper did not license the carrier to make a

> similar undercharge to other shippers, and if having paid a rebate of 25 cents per ton to one customer, the carrier, in order to escape the suit, had made a similar undercharge or rebate to the plaintiff, it would have been criminally liable, even though it may have done so in order to equalize the two companies."

This Court further said:

> "To adopt such a rule and arbitrarily measure damages by rebates would create a legalized but endless chain of departures from the tariff; would extend the effect of the original crime, would destroy the equality and certainty of rates, and, contrary to statute, would make the carrier liable for damages beyond those inflicted and to persons not injured."

Let us contrast the section of the Interstate Commerce Act (viz., Sec. 2) under consideration in the case of *Penn. R. R. Co. v. International Coal Co., supra*, with the Fourth Section.

The Fourth Section makes it unlawful to charge more for the short haul than for the longer haul. Section 2 of the act is as follows:

> "Section 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by special rate, rebate, drawback or other device, charge, demand, collect or receive from any person or persons, a greater or less compensation for any service rendered, or to be rendered in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under sub-

stantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

The provision of the Fourth Section is for the benefit of the shipper, and confers upon him the right to have his property transported at charges not exceeding those made by the carrier to the more distant point. The provisions of Section 2 of the Interstate Commerce Act merely declares unlawful the charging of one shipper a lower rate than is charged another. *Clearly, Section 4 was intended to fix as the legal rate to the intermediate point the rate charged to the more distant point; but Section 2 of the Interstate Commerce Act does not purport to fix the legal rate for a particular service at the rate charged a favored shipper for the same service.*

Nevertheless this Court would probably have held the plaintiff in the case of *Penn. R. R. Co. v. International Coal Co., supra*, entitled to recover the difference between the charges paid by it and that paid by the favored shippers, if it had not been for certain considerations which the majority of the Court held to be controlling.

One of these considerations, already adverted to, was the fact that Section 2 of the bill as it originally passed the Senate, contained a provision that the carrier should be liable to all persons who have been charged a higher rate than was charged any other person or persons, for the difference between

such higher rate and the lowest rate charged upon like shipments during the same period; but that such provision was omitted from the act as finally passed by Congress.

The violation of the act complained of in *Penn. R. R. Co. v. International Coal Co., supra,* was of the same character as the violation complained of in *Great Western Ry. Co. v. Sutton,* L. R. 4 H. L. 226 (1869), *supra,* where the English Courts held that the plaintiff was entitled to recover the difference between what he paid and the lesser amount charged to the favored shipper. *But the* English Act contained no provision similar to Section 8 of the Interstate Commerce Act.

Furthermore, the decision in Penn. R. R. Co. v. International Coal Co., supra, was based upon the law that the carrier was not lawfully entitled to charge a lower rate than the rate published in its tariff. By the Interstate Commerce Act the carrier is forbidden to charge more or less than the rate specified in its tariffs, whereas the Act of Parliament contained no such provision. Therefore the English Courts in *Great Western Ry. Co. v. Sutton, supra,* held, in effect, that the lower rate accorded to the favored shipper was the lawful rate. Having held that such lower rate was the lawful rate, it followed that any charge in excess of such rate was extortionate and recoverable in an action for money had and received. This is clearly pointed out by this Court in *Penn. R. R. Company v. Inter-*

national Coal Co., supra, where the Court, at page 202, said:

> "The Act of Parliament did not require the carrier to maintain its published tariff but made the lowest rate the lawful rate. Anything in excess of such lowest rate was extortion, and might be recovered in an action at law as for an overcharge. *Denaby v. Manchester Ry. L. R.*, 11 App. Cases 97, 116. But the English courts make a clear distinction between overcharge and damages, and the same is true under the Commerce Act. For if the plaintiff here had been required to pay more than the tariff rate it could have recovered the excess, not as damages but as overcharge, and while one count of the complaint asserted a claim of this nature, the proof did not justify a verdict thereon, for the plaintiff admitted that it had only paid the lawful rates named in the tariff. *Of course, no part of such payment of lawful rates can be treated as an overcharge or as an extortion.*"

And herein lies the chief distinction between the right of the shipper here and the right of the shipper in the *International Coal Company* case, *supra. The tariff rate paid by the plaintiff in the International Coal Company case was the lawful rate; but the rate charged the plaintiff in this case was not the lawful rate, because expressly made unlawful by the Constitution.* In the *International Coal Co.* case, *supra,* the plaintiff sought to recover the difference between the lawful rate which it paid and the unlawful rate charged another shipper. *The plaintiff here was not seeking to recover the difference between a lawful rate which he paid*

and an unlawful rate paid by another person, but was seeking to recover the difference between the unlawful rate which he paid and the lawful rate which should have been charged.

In the case of the Pennsylvania R. R. Co. v. International Coal Co., 230 U. S. 184, *supra, this Court held that the giving of an unlawful rebate to one shipper did not fix the measure of the plaintiff's damage at the difference between the unlawfully low rate accorded the favored shipper and the lawful rate paid by plaintiff.*

But in the case at bar, the assignors of defendants in error were charged an unlawful rate. The damage to the assignors of defendants in error resulted as a matter of law.

A shipper who is required to pay a higher charge for the short haul than the carrier makes for the longer haul can sue for damages under the Interstate Commerce Act or he can sue to recover the overcharge. Section 8 of the act provides that if any common carrier shall do any act prohibited by the Interstate Commerce Act such common carrier shall be liable to the person injured thereby to the full amount of damages sustained in consequence of the violation of the act, together with a reasonable counsel's fee. The charging of more for the shorter haul is prohibited by the act. It is conceivable that in some cases the measure of the shipper's damage might be more than the amount of the over-

charge, but in every case such damage is at least the amount of the overcharge.

The Interstate Commerce Act recognizes the distinction between an action for damages and an action to recover an overcharge. This is pointed out by the Court in *Penn. R. R. Co. v. International Coal Co.*, 230 U. S. 184 (see page 202), *supra*. If the overcharge is prohibited by the very terms of the act the shipper may elect to sue for damages or pursue his common law remedy; if the overcharge does not result from any direct violation of the terms of the act the shipper is confined to his common law remedy.

Section 22 of the act contains the following provision:

> "Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law, or by statute, but the provisions of this Act are in addition to such remedies."

The Supreme Court of Missouri in *McGrew v. Missouri P. R. Co.*, 230 Mo. 496 (cited and quoted from by this Court in its decision in *Missouri P. R. Co. v. McGrew Coal Co.*, 244 U. S. 191) said:

> (230 Mo. 546.) "The Petition was framed upon the Act of 1872, but in view of the fact that the trial court denied the penalties asked, and allowed only the difference between the higher rates charged plaintiff and the lower rates charged by defendant for the longer distances, the judgment could be sustained upon paragraph 12 of article 12 of the Constitution.

without the aid of the Act of 1872, provided that said section of the Constitution is self-enforcing. Because if said section is self-enforcing, that is to say, if it, without the aid of any statutory enactment, makes it unlawful for a railroad company to charge more for a shorter haul than a longer one of the same class of property in any direction, the same or not, and under any or all circumstances and conditions, *then clearly the measure of damages for doing the unlawful thing, in the absence of any statute upon the subject, is the amount of the excess charged for the shorter distance over that charged for the longer distance.*"

(561) "Section 12 of article 12 of our Constitution clearly establishes an unconditional short-haul rule, without regard to direction or to circumstances and conditions. Said section declares that it shall be unlawful for any railroad company to charge for the transportation of freight or passengers a greater amount for a less distance than 'the amount charged for any greater distance'. That declaration establishes a rule, and creates a right in every passenger and shipper to a compliance with, and an (199) obedience to, its terms. . . . Said section has the same force and effect as if it read: 'It shall not be lawful in this state for any railroad company to charge, under penalties which the general assembly shall prescribe, for freight or passengers, a greater amount for the transportation of the same for a less distance than the amount charged for any greater distance.' Had said section read that way, its effect as an operative law would have been too clear for controversy. To my mind it is equally clear under the present reading."

Referring to this decision of the Missouri Court, this Court in *Missouri P. R. Co. v. McGrew Coal Co., supra,* said (page 199):

> "As construed and applied in the present cause, this section prohibits the carrier from charging in respect of intrastate commerce more for a shorter haul than for a longer one over any portion of its line within the state, without regard to direction, circumstance, or condition; and if this inhibition is disobeyed the shipper acquires an absolute right to recover any *overcharge* paid by him" (italics ours).

The case of *Pennsylvania R. R. Co. v. International Coal Co.*, 230 U. S. 184, *supra*, was a writ of error to the Circuit Court of Appeals to the Third Circuit to review the judgment of that Court in *Penn. R. R. Co. v. International Coal Co.*, 173 Fed. 1, 7 (C. C. A.). This Court held that the Circuit Court of Appeals erred in certain particulars and remanded the case to the trial Court for a new trial. This Court, however, did not criticize the portion of the opinion of the Circuit Court of Appeals which reads as follows:

> "It is now claimed that the absence of protest accompanying payment of freight is fatal to the right of action. We are of opinion such is not the case. *This is not the ordinary case of a suit to recover back a sum of money which has been mistakenly paid and received, but is one where a statute has stamped the receipt of the money as unlawful.* Thus Section 2 provides:
>
> > 'Such common carrier shall be deemed guilty of unjust discrimination which is hereby prohibited and declared to be unlawful',

and creates a statutory right to recover, not of the freight paid, but of damages, viz.:

> 'Such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act.'

From this it is clear that, Congress having conferred a statutory right of action, and having imposed a liability to action by Section 8 on the carrier, who shall 'do, or cause to be done, or permit to be done any act, matter or thing in this act prohibited or declared to be unlawful', and we may add, having conferred such right of action without imposing the precedent condition of protest, it follows that the courts cannot by construction impose on the statutory right a condition which Congress has not imposed. It follows, therefore, that this assignment cannot be sustained. This is in harmony with the holding of the Supreme Court in *United States v. Bank of Washington*, 6 Pet. 17, 8 L. Ed. 299, where it was said:

> 'Where money is wrongfully and illegally exacted, it is received without any legal right or authority to receive it; and the law, at the very time of payment, creates the obligation to refund it. A notice of intention to recover back the money does not, even in such cases, create the right to recover it back. That results from the illegal exaction of it; and the notice may serve to rebut the inference that it was a voluntary payment or made through mistake.' "

It is unnecessary for a shipper to make protest to a carrier at the time of the payment of an over-

charge. The carrier is in the superior position and the payment is in law deemed to be involuntary.

See:

S. P. Co. v. California Adjustment Co., 237 Fed. 954 (C. C. A.);

Mobile v. Steiner, 61 Ala. 571;

Chicago & Alton v. C. V. & W. Coal Co., 79 Ill. 121;

Penn. R. Co. v. International, 173 Fed. 1 (C. C. A.);

Heiserman v. Burlington, 18 N. W. 903.

To the effect that the charging of more for the short than for the long haul is an overcharge, see:

Louisville & Nashville Ry. v. Eubanks, 184 U. S. 27;

Union Pacific v. Goodridge, 149 U. S. 680.

Respectfully submitted,

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Amici Curiae.

In the Supreme Court of the United States

OCTOBER TERM, 1922

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,
Plaintiff in Error,
vs.
A. J. PARRINGTON,
Defendant in Error,
No. [redacted] 1

and

JAMES C. DAVIS,
Plaintiff in Error,
vs.
A. J. PARRINGTON,
Defendant in Error.
No. [redacted] 1

BRIEF OF DEFENDANT IN ERROR

Upon Writs of Error to the U. S. Circuit Court of Appeals for the Ninth Circuit

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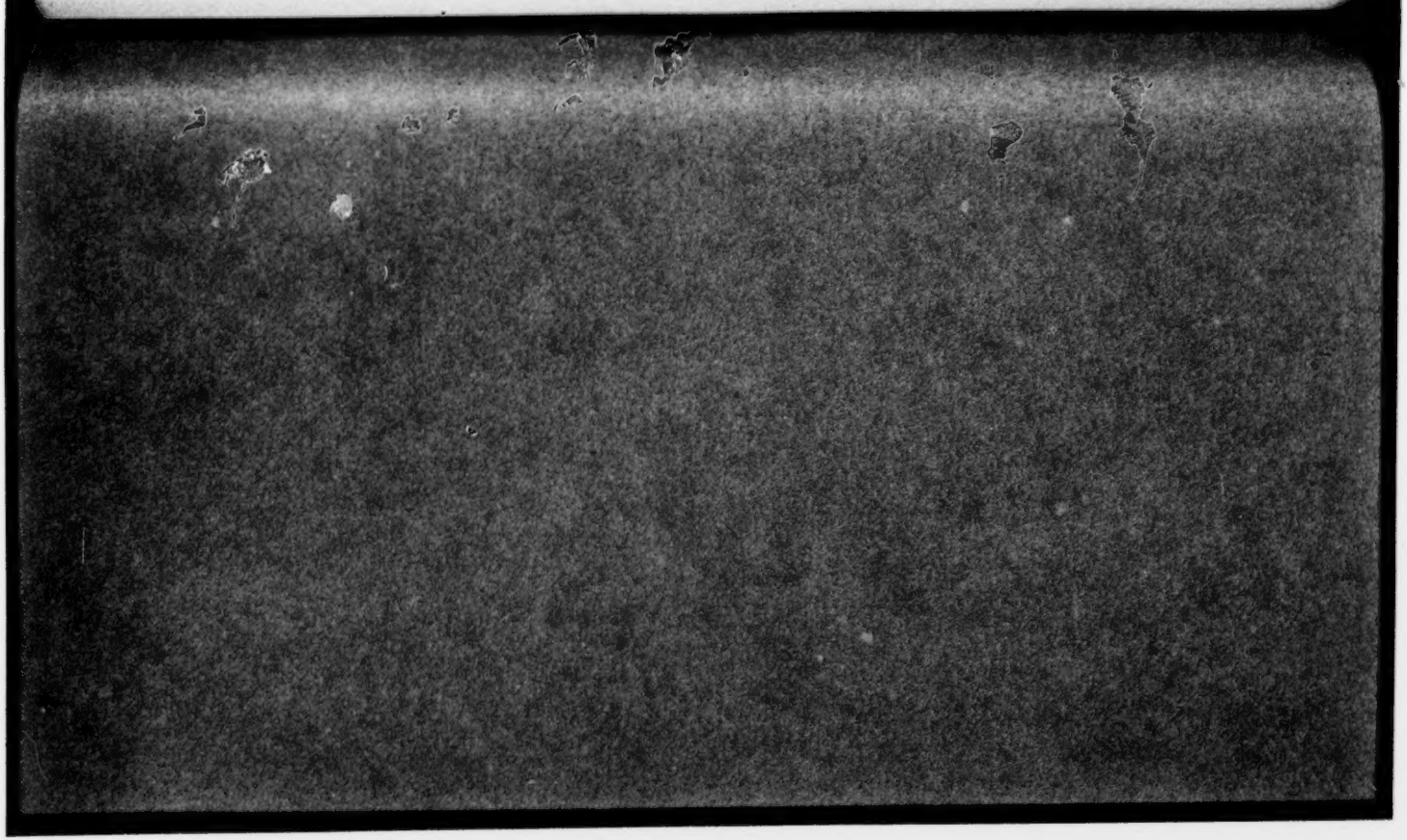

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In the Supreme Court of the United States

OCTOBER TERM, 1922

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,
Plaintiff in Error,
vs.
A. J. PARRINGTON,
Defendant in Error,
No. 594

and

JAMES C. DAVIS,
Plaintiff in Error,
vs.
A. J. PARRINGTON,
Defendant in Error.
No. 595

BRIEF OF DEFENDANT IN ERROR

Upon Writs of Error to the U. S. Circuit Court of Appeals for the Ninth Circuit

STATEMENT OF THE CASES

These cases were consolidated for hearing in both courts below and application will be made for consolidation for hearing in this Court. They involve the same facts. The first covers the period prior to and subsequent to Federal Control, and the second covers the period during Federal Control. Both cases are actions for damages for violation of the long and short haul clause of the 4th Section of the Act to Regulate Commerce. They involve rates on sugar in carload lots from San Francisco, California, to Portland, Oregon.

The shipments in question here all moved via the line of the San Francisco and Portland Steamship Company from San Francisco to Portland. The vessels of this company ply from San Francisco to Portland via Pacific Ocean, up the Columbia River to the mouth of the Willamette, thence up the Willamette River to Portland. The station of North Portland is located on the Columbia Slough about five miles above the junction of the Willamette and Columbia Rivers. (Tr. No. 594, p. 63.) The steamers of the San Francisco and Portland Steamship Company do not go to North Portland, but turn into the Willamette River five miles short thereof. Neither the San Francisco and Portland Steamship Company nor the Director General published any rates to North Portland. The regular landing place at Portland of the steamers of the San Francisco and Portland Steamship Company is at the Ainsworth Dock, where it connects with the line of railroad of the Oregon-Washington Railroad & Navigation Company. The line of railroad of said last named company extends from Portland to North Portland, and this is the only route via which any rates were published from San Francisco to North Portland in connection with the steamship line of the San Francisco and Portland Steamship Company.

On February 17th, 1916, the San Francisco and Portland Steamship Company, in connection with the O-W. R. & N. Co., put into effect a rate on sugar in carload lots of a minimum weight of 30,000 pounds, of 12½c per cwt. This rate applied via the line of the San Francisco and Portland Steamship Company to Portland, thence via the O-W. R. & N. to North Portland.

This rate continued in effect until June 25th, 1918. During all of this time on all shipments of sugar in carload lots of 30,000 lbs., from San Francisco to Portland and Astoria, Oregon, a point at the mouth of the Columbia River, the S. F. & P. S. S. Co. charged 15c per cwt.

On June 25th, 1918, the rate to North Portland was raised to 15½c per cwt., which continued in effect until August 26th, 1920. During this period the S. F. & P. S. S. Co. charged on all shipments to Portland and Astoria 19c per cwt.

From August 26th, 1920, during the balance of the period covered by the complaints, the rate from San Francisco to North Portland was 19½c per cwt. and the charge during this period made by the Steamship Company from San Francisco to Portland and Astoria was 24c per cwt.

The excess charge to Portland and Astoria, therefore, was 2½c per cwt. up to June 25th, 1918; 3½c per cwt. between June 25th, 1918, and August 26th, 1920; and 4½c subsequent to August 26th, 1920.

The route over which the sugar here involved was shipped from San Francisco to Portland and Astoria was the same as that over which the lower rate was established to North Portland, Portland and Astoria being intermediate between San Francisco and North Portland.

There is no dispute between the parties as to the shipments moving, nor as to the amount that would have been charged on the same shipments over the same route had they moved on to North Portland—that is, to the excess charges collected at Portland and Astoria for the transportation of such shipments over the rate established for the same commodity from San Francisco to North Portland.

The District Court rendered judgment in the case against the San Francisco and Portland Steamship Company in favor of the defendant in error in the sum of $11,380.69, with interest from dates of payment, together with $2,000 attorney's fees for services in the District Court, and costs and disbursements, and in the case against the Director General the lower court rendered judgment in favor of the defendant in error in the sum of $7,339.06, with interest from dates of payment, and $1,500 attorney's fees for services in that court, together with costs and disbursements. The Circuit Court of Appeals affirmed the judgment with $1000 additional attorney's fees in that Court in No. 594, and $600 additional attorney's fees in No. 595.

ARGUMENT

The basis upon which the plaintiff (defendant in error), based his cause of action and upon which recovery was had herein, is that the San Francisco and Portland Steamship Company, although a water carrier, is controlled by the ownership of all its stock by the Oregon-Washington Railroad & Navigation Company, an interstate rail carrier. That said Railroad Company had applied to the Interstate Commerce Commission, under Section 5 of the Act to Regulate Commerce, as amended by the Act of Congress of August 24, 1912, entitled "An Act to Provide for the Opening, Maintenance, Protection and Operation of the Panama Canal, and the Sanitation and Government of the Canal Zone," for permission to continue the ownership and control of said steamship line, and to continue the operation thereof, and that under said Act and the permission granted by the Interstate Commerce Commission, said company became subject to all of the terms of the Interstate Commerce Act with reference to filing tariffs, maintaining its rates, and complying with the long and short haul clause of said Act.

That said steamship line had charged rates to Portland, Oregon, on sugar in carload lots higher than its joint rate established in connection with the Oregon-Washington Railroad & Navigation Co. from San Francisco to North Portland; that the route established over which said rate applied was through Portland, and hence said steamship line while operating the same had charged more for the short haul over the same route in the same direction than it charged over the longer haul, the shorter being included within the longer.

The measure of damages sought and permitted to be recovered was the difference in the rate established to the longer point over that charged to the shorter point. In addition, the plaintiff sought and was allowed reasonable attorney's fees under Section 8 of the Interstate Commerce Act, which provides that the Court in case of recovery shall allow a reasonable attorney's fee as a part of the costs in any case where recovery is had for violation of the Interstate Commerce Act.

The points of defense contended for here by the defendants (plaintiffs in error), are:

First: That the transportation being wholly by water, the defendants were not subject to the provisions of the Act to Regulate Commerce.

Second: As to the case against the Director General that the plaintiff, being the assignee of the claims sued on was not entitled to recover, because the assignments were void as not complying with Section 3477 of the revised statute, which provides against assignment of claims against the government, except in certain cases and only in case the assignment is executed with certain formalities.

Third: That the steamship line was handled during a certain period for account of the United States Shipping Board, and that no recovery during this period could be had.

Fourth: That the question as to whether the long rate was a reasonable rate, or the short rate a reasonable

rate involves an administrative question, and hence the exclusive jurisdiction of such question under the Act to Regulate Commerce was lodged in the Interstate Commerce Commission, and that the courts had no jurisdiction to entertain the actions.

Fifth: That the 4th Section of the Act to Regulate Commerce was not violated because there was another physical connection over which the shipments could have reached North Portland without being transported into the regular landing place of the San Francisco and Portland Steamship Company at Portland and there transferred to the Oregon-Washington Railroad & Navigation Company for further transportation to North Portland.

Sixth: That the measure of damages is not the difference in the rates to the two points and that no damages could be allowed because there was no alleged proof of actual damage, and

Seventh: That all claims for shipments moving more than two years prior to the filing of the complaint were barred by the Statute of Limitations.

We will first discuss the question which has been the main bone of contention throughout all of the courts, to-wit, whether or not the courts have jurisdiction thereover, or whether the exclusive jurisdiction of such question is lodged with the Interstate Commerce Commission.

I.

THE DISTRICT COURT HAD JURISDICTION IN THESE CASES

At the outset we will state that the Interstate Commerce Commission has had before it a number of cases of violation of the long and short haul clause of the 4th Section of the Act to Regulate Commerce. It has held in these cases that no recovery may be had against the carrier for a violation of the statute unless the shipper proves that he has been specially damaged by loss of sales or injury to his business, and has refused to grant damages in the amount the shipper has been charged over and above the rate to the longer point. There have been a number of dissenting opinions by lawyer members of the Commission to this ruling, so that the opinion of the Commission is not unanimous. The courts, on the other hand, in all cases which we have found have granted damages in the difference of the two rates. The Commission justifies its holding under the decision of this court in Pa. R. R. Co. vs. International Coal Co., 230 U. S. 184, which we will discuss in the later part of this brief.

The Fourth Section of the Act to Regulate Commerce, at the time these shipments moved, so far as is applicable to this case, reads:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer

distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the intermediate rates, subject to the provisions of this Act, but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance. Provided, however, that upon application to the Interstate Commerce Commission such common carrier may in special cases after investigation be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this Section." 4 Fed. Stat. Ann. 2nd Ed. 396.

Prior to the amendment of 1910, Section 4 had inserted after the words "or of like kind of property" the words "under substantially similar circumstances and conditions." This Act, as interpreted prior to the amendment of 1910, gave the right to the carriers in the first instance to determine whether or not dissimilarity of circumstances and conditions existed which authorized them to charge more for the shorter than for the longer haul over the same line, and if on a hearing the carrier was able to prove a dissimilarity of conditions warranting the higher charge to the intermediate point, it was not subjected to any penalty. But by the amendment of

1910 this right of determination by the carrier in the first instance was taken away from it, and the prohibition of the long and short haul clause made absolute until a hearing before the Commission and an order permitting the higher rate to the intermediate point. That this amendment took away from the carriers the right in the first instance to decide the relativity of such rates, and establish a higher rate to the intermediate point, with the right to justify such rate, when called in question in a judicial proceeding is decided by the U. S. Supreme Court in the Intermountain Rate Cases, 234 U. S. 476.

The changes made by the amendment of this section in 1910 are set out in full on pages 480 and 481 of 234 U. S. On page 482 with reference to the practice before this amendment, the court said:

> "Almost immediately after the adoption of the Act to Regulate Commerce in 1887, the Interstate Commerce Commission in considering the meaning of the law and the scope of the duties imposed on the Commission in enforcing it, reached the conclusion that the words 'under substantially similar circumstances and conditions' of the fourth section dominated the long and short-haul clause and empowered carriers to primarily determine the existence of the required dissimilarity of circumstances and conditions and consequently to exact in the event of such difference a lesser charge for the longer than was exacted for the shorter haul. * * * We say primarily because of course it was further recognized that the authority existing in carriers to the end

just stated was subject to the supervision and control of the Interstate Commerce Commission in the exertion of the powers conferred upon it by the statute and especially in view of the authority stated in the fourth section. * * * These comprehensive views announced at the inception as a matter of administrative construction were subsequently sustained by many decisions of this court, and to the leading of such cases we refer in the margin."

And again at page 484 the court says:

"With the light afforded by the statements just made we come to consider the amendment. It is certain that the fundamental change which it makes is the omission of the substantially similar circumstances and conditions clause, *thereby leaving the long and short-haul clause in a sense unqualified* except in so far as the section gives the right to the carrier to apply to the Commission for authority 'to charge less for longer than for shorter distances for the transportation of persons or property' and gives the Commission authority from time to time 'to prescribe the extent to which such designated common carrier may be relieved from the operation of this section.' "

The court then points out that the change brought about by the amendment was to shift from the carrier to the Commission the determination of when the carrier may be relieved from the strict prohibition of the statute and says:

"That is, it takes from the carriers the deposit of public power previously lodged in them and vests it in the Commission as a primary instead of a reviewing function. * * * This being true, as we think it plainly is, the situation under the amendment is this: *Power in the carrier primarily to meet competitive conditions in any point of view by charging a lesser rate for a longer than for a shorter haul has ceased to exist* because to do so, in the absence of some authority, would not only be inimical to the provision of the fourth section but would be in conflict with the preference and discrimination clauses of the second and third sections. But while the public power, so to speak, previously lodged in the carrier is thus withdrawn and reposed in the Commission the right of carriers to seek and obtain under authorized circumstances the sanction of the Commission to charge a lower rate for a longer than for a shorter haul because of competition or for other adequate reasons is expressly preserved and if not is in any event by necessary implication granted. And as a correlative the authority of the Commission to grant on request the right sought is made by the statute to depend upon the facts established and the judgment of that body in the exercise of a sound legal discretion as to whether the request should be granted compatibly with a due consideration of the private and public interests concerned and in view of the preference and discrimination clauses of the second and third sections."

In the case of United States vs. Louisville & Nashville Railroad Co., 235 U. S. 314, the court had before it certain rebilling rates in the consideration of which the question of the long and short-haul clause arose. The Interstate Commerce Commission had passed an order which had been enjoined by the Commerce Court and in considering the rates the court said, page 322:

> "We pass this subject by, however, because its consideration is not essential to determine whether the Commission was right in prohibiting a continuance of the rebilling privilege since we are of the opinion that even if the allowance of such rebilling privilege when originally made was authorized by the statute and was therefore not a preference, *the right to continue it had been expressly prohibited by statute until, on application made to the Commission, its consent to that end was given.* The express or implied statutory recognition of the authority on the part of carriers to primarily determine for themselves the existence of substantially similar circumstances and conditions as a basis of charging a higher rate for a shorter than for a longer distance within the purview of Section 4 of the Act to Regulate Commerce, and the right to make a rate accordingly to continue in force until on complaint it was corrected in the manner pointed out by the statute *ceased to exist after the adoption of the amendment of Section 4 by the Act of June 18, 1910.* * * * This results from the fact that by the amendment in question the original power to

determine the existence of the conditions justifying the greater charge for a shorter than was exacted for a longer distance was taken from the carriers and primarily vested in the Interstate Commerce Commission, and for the purpose of making the prohibition efficacious it was enacted *that after a time fixed no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted.*"

Again in the case of Skinner & Eddy Corp. vs. U. S., 249 U. S. 566, in considering the amendment to the long and short haul clause of the Act, the Supreme Court said:

"A special group of cases in which the Commission may indirectly prevent unduly low rates through its power to prevent unjust discrimination is that provided for by the long and short haul clause. It was enacted to remedy one large class of discriminations by creating a legislative presumption that the charge of more for a short haul under substantially similar circumstances and conditions than for a longer distance over the same line in the same direction was unjust. As originally enacted, the provision was construed to authorize the carrier to determine primarily whether the required dissimilarity of circumstances and conditions existed and also to authorize the acceptance of competitive conditions as a justification of a lower rate for the longer distance. So construed, the provisions proved

inefficacious, and the act was amended in 1910 by striking out the 'substantially similar circumstances and conditions' clause and making the prohibition absolute except to 'the extent to which such designated common carrier may be relieved from the operation of this section' by the Commission. Intermountain Rate Cases, supra."

It is, therefore, settled and determined that by the amendment of the Fourth Section as interpreted by this Court that the carrier has no right to charge more for a shorter haul over the same line or route than it charges for a longer, the shorter being included within the longer distance, until it presents the matter to the Interstate Commerce Commission and gets an order of the Commission permitting such greater charge to the shorter point. In the present cases no such permission was obtained, and therefore the greater charge to the shorter point was illegal, it being expressly prohibited by the statute.

It is contended by the plaintiffs in error that the question as to which rate is illegal, that is, the rate to the shorter point or the one to the longer point, is an administrative question, and therefore must be submitted to the Interstate Commerce Commission for its ruling prior to any action in court. This contention is based upon the principle announced by the U. S. Supreme Court in Texas & Pacific Ry. Co. vs. Avilene Cotton Oil Co., 204 U. S. 426, and other cases following that principle. But, as stated by the District Court, this principle applies "where the legal quality of the practices com-

plained of is not definitely fixed by statute, but is an administrative question depending upon the facts to be ascertained from investigation, in which case the Commission has original jurisdiction." Where, however, the practice is directly prohibited by statute, the person injured thereby need not go originally to the Commission but may sue directly in court.

Penn. Railroad Co. vs. International Coal Co., 230 U. S. 184.

Penn. Railroad Co. vs. Puritan Coal Co., 237 U. S. 121.

Penn. Railroad Co. vs. Somner, 242 U. S. 120.

The principle is well illustrated by the three cases decided on the same day found in 230 U. S. The first is that of Pennsylvania Railroad Company vs. International Coal Company, 230 U. S. 184, the second that of Mitchell Coal Co. vs. Pennsylvania Railroad Co., 230 U. S. 247, and the third that of Morrisdale Coal Co. vs. Pennsylvania Railroad Co., 230 U. S. 304.

The first of these cases was one instituted by a shipper to recover damages on account of rebates given to plaintiff's competitor. The contention was made that the court had no jurisdiction and that the case should be remanded with instructions to dismiss the complaint "upon the ground that the court had no power to adjudicate the administrative question as to whether a carrier could make a difference in rate between shipments of free and

contract coal. It argued that this was a rate making question and that it was for the Commission as the rate regulating body to determine not only whether a dissimilarity existed but whether the rates were properly adjusted to meet that dissimilarity." (230 U. S. 196.) The court then points out that there are many acts of the carriers which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust, and that determination of such issues is an administrative question and calls for the exercise of the discretion of the administrative and rate-making body, and then says:

> "None of these considerations, however, operates to defeat the court's jurisdiction in the present case, for even if a difference in rates could be made between free and contract coal, *none was made in the only way in which it could have been lawfully done.* The published tariffs made no distinction between contract coal and free coal but named one rate for all alike. That being true, *only that single rate could be charged.* When collected, it was unlawful under any pretense or for any cause, however equitable or liberal, to pay a part back to one shipper or to every shipper. * * * The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation."

This Court in that case sustained the jurisdiction of the court to recover any damages caused by the unlawful rebating to the competing Coal Company.

In the case of Mitchell Coal Co. vs. Pennsylvania Railroad Co., immediately following this decision, the court denied relief because under the tariff the Railroad Company was paying certain allowances in connection with certain services, and held that as the services were provided for in the tariff, the reasonablesness of such allowances was within the primary jurisdiction of the Commission and the courts could not allow damages to a competitor until he had established before the Commission the unreasonableness of the rule under which the allowances were made.

In the Morrisdale Coal Co. case this Court denied the jurisdiction of the courts to allow damages for discrimination in distribution of cars under rules established and filed with the Interstate Commerce Commission until the Interstate Commerce Commission had investigated the reasonableness of the rules and declared them unreasonable.

This principle is further illustrated in Pennsylvania Railroad Company vs. Puritan Coal Co., 237 U. S. 121, and the primary jurisdiction of the court sustained on the ground that the plaintiff was not attacking the reasonablesness of the rule established for the distribution of cars, but was attacking the manner in which the cars were distributed under the rule, and sustained the right of a shipper in the latter case to apply directly to the

court, and this principle is further amplified and clarified in the case of Pennsylvania Railroad Co. vs. Sonman Coal Co., 242 U. S. 120, which was also a car distribution case and where the shipper was attacking not the reasonableness of the rule for distribution but the manner in which the Railroad Company distributed its cars under the rule established. In this latter case the court says (242 U. S. 124):

> "Thus we have heard * * * that the Act does not supersede the jurisdiction of state courts in any case, new or old, where the decision does not involve the determination of matters calling for the exercise of the administrative power and discretion of the Interstate Commerce Commission, or relate to a subject as to which the jurisdiction of the Federal Courts is otherwise made exclusive; that claims for damages arising out of the application, in interstate commerce, of rules for distributing cars in times of shortage, call for the exercise of the administrative authority of the Commission where the rule is assailed as unjustly discriminatory, but *where the assault is not against the rule* but against its unequal and discriminatory application, no administrative question is presented and the claim may be prosecuted in either a federal or a state court without any precedent action by the Commission."

A later expression of this Court is in the case of St. Louis, Iron Mountain & Southern Railway Co. vs. J. F. Hasty & Sons, 255 U. S. 252, in which the interpretation of a tariff was involved, and in which the question of

whether or not material called rough heading for barrels came within an item of the tariff providing a rate "on rough lumber, staves, flitches, bolts, and logs." This Court decided that it did come within that provision of the tariff, and with reference to its being an administrative question, the court says:

> "The matter is so free from doubt that there is no occasion to apply to the Commission for a construction, as insisted by appellant under Texas & Pacific Ry. vs. American Tie Co., 234 U. S. 138, 146."

The last expression of this court which we have found on this matter is Great Nor. Ry. Co. vs. Merchants Elevator Co., 259 U. S. 285-296, in which a question as to the right of the court to interpret a tariff on which there was a doubt as to whether the general rule or an exception to the rule applied to the particular shipments in question, and the court reviews at considerable length its former decisions and reaffirms the principle holding that in such cases the court had original jurisdiction.

The rule seems clearly established that if the cause of action depends upon the requirements of a change in the established rules or tariffs of the carrier, then the matter of determining the reasonableness of such rules or tariffs is an administrative question and must go before the Commission before action may be brought thereon in court. If, however, the party is simply seeking a right under the established rules or tariffs or the enforcement of a statute which prescribes the rule, the injured party may apply directly to the court for the enforcement thereof, there is no administrative question

involved. It is simply an application of the established rule or statute.

In the present case the statute specifically declares that the carrier shall not charge more for the long haul than for the short haul. There is no dispute as to the fact that the shipments moved, that the carriers charged a higher rate to Portland and Astoria, the short points, than its established rate to North Portland. There is no dispute of the fact that it had not secured an order of the Interstate Commerce Commission permitting a higher charge to the shorter points, and we submit that there is no administrative question involved, but simply the enforcement of the rule laid down by the statute. The rate so established violated the provisions of the long and short haul clause.

Section 8 of the Interstate Commerce Act provides that in case any common carrier subject to the provision of this Act shall do, cause to be done, or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby to the full amount of damages sustained in consequence in violation of the provision of this Act, together with reasonable counsel's or attorney's fees, to be fixed by the court in every case of recovery, which attorney's fees shall be taxed and collected as a part of the costs in the case.

Section 9 of the Act give the right to any person claiming to be damaged to make complaint either to the

Commission or to bring suit for damages in the District Court of the United States.

Under the principle above announced as to the cases which may be brought directly in the courts and those which must be brought primarily before the Commission, we are seeking damages for violation of the long and short haul clause. The statute makes the prohibition, we have proved the violation of it, there is no administrative question involved, and we are entitled to sue directly in the court.

II.

THE TRANSPORTATION, THOUGH WHOLLY BY WATER, IS SUBJECT TO THE INTERSTATE COMMERCE ACT

It is contended in plaintiff's brief that because the transportation was wholly by water that it is not subject to the Act, but we submit that this is absolutely untenable, and that the carrier has accepted the provisions of the Interstate Commerce Act and made itself liable thereto. The record shows that the Oregon-Washington Railroad & Navigation Company, as owner of all of the stock of the San Francisco and Portland Steamship Company had applied to the Interstate Commerce Commission, under Section 5 of the Act to Regulate Commerce as amended by the Panama Canal Act, to be permitted to continue the operation of this line as a public convenience, and permission was granted by the Interstate Commerce Commission. (Tr. No. 594, P. 61, Tr. No. 595, P. 55—Plaintiff's Exhibit 2 in both cases.)

This application and the permit granted was in direct compliance with the Panama Canal Act, and the steamship company has complied therewith by filing its tariffs. It should not now after invoking the provisions of this act and holding itself out to the public as subject thereto, be heard to say that it is not bound by the provisions of the act. Section 11 of the Panama Canal Act of August 24th, 1912, 37 Stat. L. Page 566, provides that Section 5 of the Act to Regulate Commerce should be amended as follows:

> "From and after the first day of July, nineteen hundred and fourteen, it shall be unlawful for any railroad company or other common carrier subject to the Act to Regulate Commerce to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense."

It is contended by the plaintiffs in error that the provisions of the Panama Canal Act immediately following this amendment did not in fact amend the Interstate Commerce Act. In any event, it was a solemn act of Congress and provided as follows:

"Jurisdiction is hereby conferred on the Interstate Commerce Commission to determine questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation of this section and pray for an order permitting the continuance of any vessel or vessels already in operation, or for the purpose of asking an order to install new service not in conflict with the provisions of this paragraph. The Commission may on its own motion or the application of any shipper institute proceedings to inquire into the operation of any vessel in use by any railroad or other carrier which has not applied to the Commission and had the question of competition or the possibility of competition determined as herein provided. In all such cases the order of said Commission shall be final.

"If the Interstate Commerce Commission shall be of the opinion that any such existing specified service by water other than through the Panama Canal is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce competition on the route by water under consideration, the Interstate Commerce Commission may, by order, extend the time during which such service by water may continue to be operated beyond July first, nineteen hundred and fourteen. In every case of such extension the rates, schedules, and practices of such water carrier shall be filed with the Interstate Commerce Commission and shall be subject to the Act to Reg-

ulate Commerce and all amendments thereto in the same manner and to the same extent as is the railroad or other common carrier controlling such water carrier or interested in any manner in its operation"
* * *

There is nothing inconsistent with the provisions of this act and the other provisions of the Interstate Commerce Act as attempted to be maintained by plaintiffs in error. It applies to those water carriers owned or controlled by rail carriers subject to the act. The evils aimed at were the practices of rail carriers in maintaining water lines so as to prevent any water competition and for the purpose of protecting their rail traffic against such water competition, and the act of Congress was designed to bring any such water carriers under the provisions of the act. The plaintiffs in error accepted the law and complied with it, and it seems to us that the language is so plain that it cannot possibly be construed as to except the water carrier when the transportation is wholly by water and subject to the Interstate Commerce Act only when it enters into a joint rate with the rail carrier. Such transportation is subject to the Act and was made so subject to the act prior to the enactment of the Panama Canal statute by the amendment of Section 1 in 1906.

We submit that Congress had only in mind the subjecting of railroad owned water carriers to the full terms of the Interstate Commerce Act as to all of its business. Otherwise, the evil at which these provisions of the Panama Canal Act were aimed would have been permitted to continue after the enactment of the statute as well as before, for such carriers could have been used wholly to destroy competition. The railroad company could have

run its vessels only when some other carrier came on to a route and cut rates so as to kill off the competition, leaving the railroad carrier's business unmolested. The whole object and purpose of the provisions of the Act, as shown by its wording was to preserve such water competition and not to kill it and Congress took the means to preserve it by subjecting such railroad owned carrier to the full measure of the provisions of the Interstate Commerce Act.

We therefore submit that the transportation between San Francisco, Astoria and Portland, while wholly by water is when carried in the railroad controlled vessels, in all respects subject to the Act.

III.

ASSIGNMENT OF CLAIMS

It is claimed in the brief of plaintiffs in error that the assignment of all the claims of the shippers to the defendant in error was void because not complying with Section 3477 of the revised statute. This objection refers only to the case against the Director General. We submit, however, that this question is not before this court for the reason that it was not raised in the lower court. The only reference in the bill of exceptions thereto is found in Tr. No. 595 at Page 54 and is as follows:

> "Mr. Wilson offered documentary evidence that plaintiff was the owner by assignment of the claims mentioned in the respective causes of action of the complaint and supplemental complaint, and it was established that plaintiff is the owner of such causes of action."

There was no objection made to the assignments when offered and no exception taken with reference thereto. The sufficiency of said assignments was conceded. No question was likewise raised in the Circuit Court of Appeals and neither of the lower courts were called upon as to the validity of said assignments.

Notwithstanding the fact that this question is not raised by the record, we submit that claims of this character may be brought by the assignee. In the case of Spiller vs. A. T. & S. F., 253 U. S. 134, this court has sustained the right of an assignee to maintain an action against a carrier on such claims. The fact that the Director General was operating the line we submit did not prevent the assignment. Section 10 of the Federal Control Act provides:

> "That carriers while under federal control shall be subject to all laws and liabilities as common carriers whether arising under state or federal laws or at common law, except insofar as may be inconsistent with the provisions of this Act or any other act applicable to such federal control or with any order of the president. Actions at law or suits in equity may be brought by it against such carriers and judgments rendered as now provided by law and in actions at law or suits in equity against the carrier *no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government.*"

The defense of the invalidity of the assignments is a defense based purely and simply upon the ground that the defendant is an instrumentality or agency of the Federal Government.

This court has held in the Spiller case above shown that such assignments are valid as against a carrier not under federal control and if assigned claims may be maintained against such carrier, then it was plainly the intent that such assigned claims could be maintained against the carrier when under federal control.

This court in Mo. Pacific R. R. Co. vs. Ault, 256 U. S. 559, in construing this section says:

> "The plain purpose of the above provision was to preserve to the general public the rights and remedies against common carriers which it enjoyed at the time the railroads were taken over by the President except in so far as such rights or remedies might interfere with the needs of federal operation. The provision applies equally to cases where suits against the carrier companies were pending in the courts on December 28, 1917; to cases where the cause of action arose before that date and the suit against the company was filed after it; and to cases where both cause of action and suit had arisen or might arise during federal operation. The Government was to operate the carriers, but the usual immunity of the sovereign from legal liability was not to prevent the enforcement of liabilities ordinarily incident to the operation of carriers * * * Operation was to be continued as theretofore with the old personnel, subject to change by executive order. The courts were to go on entertaining suits and entering judgments under existing law, but the property in the hands of the President for war purposes was not to be disturbed. With that exception the substantial legal rights of persons having deal-

ings with the carriers were not to be affected by the change of control."

The court further amplifies this language.

In another action pending before the District Court of the United States for the District of Oregon this identical question was raised and Judge Wolverton held the assignments valid. Parrington vs. Davis, 285 Fed. 751.

In Seaboard Air Line Railway vs. United States, 256 U. S. 655, this court discussed the reason for the provisions of Section 3744 of the revised statute and holds that it does not apply in case of the consolidation authorized by statutes of two states.

We submit that the assignments were not void but action could be maintained thereon against the carriers while under federal control.

IV.

CARRIERS ARE LIABLE NOTWITHSTANDING CERTAIN OF THE BOATS ON WHICH PART OF THE SUGAR WAS HANDLED WERE UNDER REQUISITION OF THE UNITED STATES SHIPPING BOARD FOR A PORTION OF THE PERIOD.

It appears in the record (Tr. No. 595, P. 84) (No. 594, P. 90), that on October 12th, 1917, the San Francisco and Portland Steamship Company was given notice by Bainbridge Colby, Commissioner, that the

United States Shipping Board was requisitioning all American steamers enumerated therein, and that the "Rose City" and "Beaver" of the San Francisco and Portland Steamship Company were of the class requisitioned. These steamers continued on their routes and were continued to be operated by the San Francisco and Portland Steamship Company and the United States Railroad Administration. The tariffs under which shipments were carried were the tariffs of the San Francisco and Portland Steamship Company and the Director General. The contracts of carriage as shown by the evidence were the contracts of the San Francisco and Portland Steamship Company and the Director General; the agents receiving the shipments were the employes of these concerns. No tariffs were filed by the United States Shipping Board with the Interstate Commerce Commission, and no contracts of carriage were issued by that Company. The shippers therefore had no contractual relations with the United States Shipping Board, were never advised in any way that they were dealing with the United States Shipping Board. The contracts which gave rise to these actions were by the shippers and the plaintiffs in error in this case and no other. It made no difference to the shipper what boats its contractors used for the transportation of these shipments, and if these plaintiffs in error saw fit to contract with the public during this period they were liable to the public on those contracts, notwithstanding two of their boats had been requisitioned by the Government, and notwithstanding they may have carried the articles on the requisitioned boats. Their tariffs holding themselves out to the public as carriers during this entire period were on file and anyone having traffic to haul could rely thereon.

We therefore submit they still remained liable during this period to the plaintiff's assignors.

V.

NORTH PORTLAND AND PORTLAND ARE ON THE SAME ROUTE, PORTLAND BEING INTERMEDIATE, ON SHIPMENTS FROM SAN FRANCISCO TO NORTH PORTLAND.

It is claimed by plaintiffs in error that because the boats of the San Francisco and Portland Steamship Company might have run beyond the mouth of the Willamette River up to North Portland and delivered the shipments, or could have transferred the same through the terminal of the City of Portland without bringing them up to the vessels' regular landing place at Portland and there transferring to the line of the Oregon-Washington Railroad & Navigation Company that Portland is not intermediate from San Francisco to North Portland and therefore it was no violation of the Act.

Neither one of these contentions is tenable for the reason that the San Francisco and Portland Steamship Company does not include North Portland in its tariffs except via Portland and the Oregon-Washington Railroad & Navigation line.

As heretofore pointed out, North Portland is farther East than the mouth of the Columbia River where the boats of the San Francisco and Portland Steamship Company turn South into the Willamette River to Portland. The tariffs of the San Francisco and Portland

Steamship Company not naming North Portland as one of the stations on its boat line, cannot carry traffic thereto. The very first provision of Section 6 of the Act to Regulate Commerce provides:

> "That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established * * * The schedules printed as aforesaid by any such common carrier *shall plainly state the places between which property and passengers will be carried*" * * *

Not having named North Portland as one of the places to which it would carry freight by its own boats, that was not an available route for such transportation under the Interstate Commerce Act.

The route through the Munipical Terminal was likewise not an available route. The Municipal Terminal is located on the Willamette River, partly within and partly without the city limits of Portland. It is north of the regular landing place of the San Francisco and Portland Steamship Company vessels at Portland and can be reached on the route from San Francisco to the steamship company's regular landing place at Portland before reaching that landing. At the Municipal Terminal, which is owned and operated by the City of Portland, there are slips for the accommodation of vessels, and tracks from

these slips to a connection with the O.-W. R. R. & N. line. Over these tracks are operated switch engines of the City of Portland, and the nearest slip from the line of the O.-W. R. R. & N. Co. would involve a haul over these tracks of the City of Portland of at least 2,000 feet. The tariff of the City of Portland for the use of these terminal facilities is not filed with the Interstate Commerce Commission (Tr. No. 594, P. 85, and No. 595, P. 80). As stated by the witness Mount, "The tariffs of the City of Portland change oftener than the moon does". (Tr. No. 594, P. 85, and No. 595, P. 80.)

The route from San Francisco to North Portland via the San Francisco and Portland Steamship line, the Portland Municipal Terminal and the Oregon-Washington Railroad & Navigation Company was not an available route because the tariffs over that route were not filed with the Interstate Commerce Commission. Subdivision 4 of Section 6 of the Interstate Commerce Act provides:

> "The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission," etc. * * *

Subdivision 7 of Section 6 of the Act to Regulate Commerce provides:

> "No carrier, unless otherwise provided by this Act, shall *engage or participate* in the transportation of passengers or property, as defined in this

> Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act." * * *

The tariff involved in this case does not and no other tariff shown by the record permits the carrying of property through Municipal Terminal No. 4 of the City of Portland from San Francisco to North Portland because the City of Portland over that route would be a participating carrier, and the law requires it to join in the tariff, and neither the San Francisco and Portland Steamship Company nor the Oregon-Washington Railroad & Navigation Company could publish a tariff over that route without the participation of the City of Portland in the tariff.

There is another reason against the consideration of this route and that is that the Municipal Terminal of the City of Portland was not in existence until the spring of 1919, long after the rates and route to North Portland through Portland were established. The fact is, the tariffs in question from San Francisco to North Portland in this case definitely fix the route. These tariffs specify that this rate applies "via Route No. 1 as shown on Page 34", and on that page under the caption of "Routing", Route No. 1 is specified as "via the San Francisco and Portland Steamship Company to Portland, Oregon, and Oregon-Washington Railroad & Navigation Company from Portland to North Portland", (Tr. No. 594, P. 64, and No. 595, P. 58). This route was established long before the Portland Municipal Terminal was in existence. The claim that the Municipal Terminal route is an available route is a

makeshift in an attempt to avoid the penalty of the 4th Section.

Mr. J. W. Mount, Assistant General Freight Agent of the Union Pacific, a witness on behalf of the plaintiffs in error, when on the stand on cross examination on the subject of the City of Portland joining in the tariffs, said:

> "All sugar going on the Oregon-Washington Railroad & Navigation Company's lines coming into the City of Portland by boat is ordinarily transferred at Ainsworth Dock. I merely mean to say that physically, sugar can transfer from water to rail at Municipal Dock No. 4, and that it is just as good, if not a better physical connection than the Ainsworth Dock." (Tr. No. 594, P. 88, No. 595, P. 83.)

It requires something more than a physical connection to establish a route within the meaning of the Interstate Commerce Act. Via the only established route as shown by the tariffs on file with the Interstate Commerce Commission, the route to North Portland is through Portland, and Portland is therefore intermediate to North Portland and a charging via this route, as was shown by the evidence in this case, of a lower rate to North Portland than that charged to Portland is a violation of the 4th Section of the Interstate Commerce Act.

VI.

THE ACTUAL SHOWING THAT SHIPMENTS HAVE BEEN MADE TO NORTH PORTLAND AS A CONDITION TO RECOVERY IS NOT NECESSARY.

The question was raised by the plaintiffs in error that because the defendant had not shown actual movements to North Portland that no violation of the Act was shown.

At North Portland is located a packing plant of Swift & Company, in which quantities of sugar are used. The San Francisco and Portland Steamship Company joined with the Oregon-Washington Railroad & Navigation Company in establishing a joint rate thereto. The law requires, as pointed out in the foregoing section of this brief, the carriers to "print and keep open to public inspection, all rates, fares and charges for transportation between different points" * * * It is claimed that because Section 4 of the Act provides that it shall be unlawful for any carrier "to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance", before recovery can be had that it must be proved that not only the carrier publishes rates to the further point, but that it must also be proved that it has actually charged those rates. This would in many cases be an impossibility. The law requires the publication of the rates and charges to be made. It requires the carriers to keep them open to public inspection. They cannot be changed except by

special permission of the Interstate Commerce Commission in emergency cases under thirty days' notice. The public is bound to take notice thereof. It has a right to rely upon this publication of the carrier and when it publishes the lower rate to the further point, unless it gets special permission therefor from the Interstate Commerce Commission the higher rate to the intermediate point ceases to exist.

In United States vs. Louisville & Nashville, 235 U. S. 322, this court says:

> "The right to continue it" (That is, the greater charge for the shorter distance), "had been expressly prohibited by statute until on application made to the Commission its consent to that end was given."

And again, at Page 325, Mr. Chief Justice White says with reference to the long and short haul clause * * * "and for the purpose of making the provision efficacious it was enacted that after a time fixed *no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted.* Int. Mountain Rate Cases, 234 U. S. 476. If then it be that the rebilling privilege which is here in question, disregarding immaterial considerations of form and looking at the substance of things, was, when originally established, an exertion of the authority conferred or recognized by Section 4 of the Act, as there is no pretense that permission for its continuance had been applied for as required by the amendment and the statutory period for which it could be lawfully continued without such permission had expired, it follows that its continued operation was manifestly unlawful

and error was committed in permitting its continuance under the shelter of the injunction awarded by the court below."

The above language was used with reference to rates in effect at the time the amendment of 1910 of the 4th Section of the Act went into effect. In the present case the lower rate to the further point was established after the amendment of 1910 went into effect. If a rate in existence at the time of the amendment could not continue after a certain date without the authority of an order of the Interstate Commerce Commission, then certainly a subsequently established higher rate to the intermediate point, without first securing the Commission's order could not become effective. The only rate therefore which could have been legally charged in view of this prohibition of the statute was the lower rate established to the further point, because the other rate by the establishment of this rate to the further point became illegal, and therefore we submit it did not devolve upon the shipper to prove an actual shipment to the further point.

This question has been considered by the Supreme Court of California with reference to the long and short haul provision of the California law in California Adjustment Co. vs. A. T. & S. F., 179 Cal. 140, 175 Pac. 682. An examination of this case will show that the language of the California law in this respect is identical with that of the Interstate Commerce Act. With reference thereto that court says:

> "Nor do we think it material, whether when the shipments to intermediate points complained of as excessively charged for were made no contempo-

raneous shipment to the more distant point was made. Under the constitutional provision the legitimate maximum charge for the shorter haul is the charge the carrier makes for the longer one, and it is only necessary to show in proof of an illegal discrimination that the shipper paid a larger sum for the short haul than the defendant would have charged for the longer one. Actual shipment for the longer distance is not required to be shown. All that is required is a showing that the defendant held out and published to the shipping world that it would charge certain rates for the transportation of a certain class of merchandise from San Francisco to Los Angeles. This was shown, and when shown, for the purpose of determining whether discrimination was practised or not, the rates so held out to be charged are deemed in law to have been charged."

The Supreme Court of Ohio likewise in Beeghly vs. Public Utilities Commission (135 N. E. 641), passing upon a similar long and short haul provision of the Ohio law, arrives at the same conclusion.

VII.

STATUTE OF LIMITATIONS

It is claimed that certain of the claims sued on in Docket No. 594 are barred by the Statute of Limitations, for the reason that the action was not commenced within two years after movement thereof. In the brief this same question is raised with reference to certain of the claims in Docket No. 595, but the record in the lower court in this Docket does not raise that question.

In Docket No. 595 there was submitted a demurrer in the following words:

> "Comes now the above named defendant and demurs to the complaint on file herein on the ground that
>
> I.
>
> "This Court has no jurisdiction of the subject matter of the action.
>
> "Defendant will rely in presenting this demurrer on the proposition that the Interstate Commerce Commission has exclusive original jurisdiction of controversies of this character." (Transcript 595, Page 21.)

No general demurrer or demurrer on the ground that the action had not been commenced as to any of the claims within the time prescribed was filed. The answer is simply one of general denial, except that by special answer it is suggested that James C. Davis had succeeded John Barton Payne. (Transcript 595, Pages 35 to 38.)

At the time of the trial no objection was made to any of the claims, nor was any such question raised. In fact, the claims had all been submitted to the defendant, checked, and the amount agreed upon. The only reservation made was that certain claims had been carried during the time after the Shipping Board had wired requisitioning certain steamers of the plaintiff in error and prior to the date when the notice of release of said vessels was sent, but no question as to any of said claims not being within the Statute of Limitations was ever raised.

As to Docket 594, the Demurrer did not raise the question of the Statute of Limitations as to those claims arising prior to January 1, 1918 (Transcript No. 594, Page 22), so that the only question raised before the lower court was as to those claims prior to January 1, 1918, in the case against the Steamship Company.

Reliance is had on case of Kansas City Southern, plaintiff in error, vs. Wolf et al., 43 S. C. R., 259, decided February 19, 1923. This case had not been decided in this Court at the time the present cases were decided. The decision in that case in the lower court was to the contrary, as was the decision in the present cases. The Interstate Commerce Act itself does not specifically prescribe the limitation period for actions commenced by shippers before the court. The Act does, by Sections 8 and 9, give a choice of forum either before the Commission or the District Court of the United States, but the Act only specifically places a limitation upon proceedings before the Commission.

The Court in the Wolf case bases its decision entirely upon its former decision in the case of Phillips vs. Grand Trunk Western Ry. Co., 236 U. S. 662, 667, but that was a case on a claim which admittedly had to be commenced originally before the Commission. Such a case had been commenced before the Commission, not by the plaintiff in the Phillips case, but by another plaintiff on a similar claim. The Commission had established the right to recover and the plaintiff in the Phillips case commenced his action in court based upon the proceedings before the Commission, and the Court properly held that the person commencing in the Court could not have a different period of limitation than that before the Commission.

In the Wolf case this Court holds that the same principle applies. We respectfully ask for a reconsideration of this ruling. The Court in the Phillips case says that in those cases where the statute reads as does the Interstate Commerce Act, to-wit: that the proceeding shall be commenced within two years from the time the cause of action accrues and not after, the liability is destroyed. If this is the case then we submit that the same rule should apply to all questions of damages in any case which might have been submitted to the Commission, whether it may be sued upon in the state court, the United States Court, or before the Commission, and this Court has in several cases since the Phillips case permitted recoveries in cases involving interstate traffic which could have been submitted to the Commission, but were commenced in the state courts and recovery was permitted for periods considerably in excess of two years. Thus in the case of Pennsylvania Rld. Co. vs. Puritan Coal Co., 237 U. S. 121, it appears that an action for damages was commenced in the State Court of Pennsylvania for damages for discrimination in distribution of cars under tariff rules prescribed by the Railroad Company. It appeared that the cars desired were for both destinations within and without the State of Pennsylvania. (237 U. S. 124 and 127.) The action was commenced in March, 1908, and it appears on Pages 123 and 130 that claims as far back as 1902 were involved. It likewise appears that the question of the Statute of Limitations had been raised. (Page 123.)

The amendment of Section 16 of the Act to Regulate Commerce, approved June 29, 1906, reads as follows:

> "All complaints for the recovery of damages shall be filed with the Commission within two years

from the time the cause of action accrues, and not after. * * * Provided that claims accrued prior to the passage of this Act may be presented within one year."

So that if the Act is to be construed, by reason of the necessity for uniformity, so that this limitation applies to the Courts as well as the Commission, it should likewise apply as well to actions in the State Courts as those in the United States Courts, and would apply to all of the interstate claims in the Puritan Coal case, and hence, on the theory that the liability was destroyed, all of said interstate claims in the Puritan Coal case would have been barred, for they accrued prior to the amendment of June 29, 1906, and they must necessarily have been commenced within one year thereafter, but the action was not commenced, as shown by the opinion, until March, 1908, but this Court affirms the judgment in that case permitting the recovery, and this opinion was rendered subsequently to the opinion in the Phillips case.

Again in the case of Pennsylvania Rld. Co. vs. Sonman Coal Co., 242 U. S. 120, it appears that the Coal Company had brought action to recover damages from the Railroad Company for a period of four years, beginning April 1, 1903. It does not appear from the opinion just when the action was commenced, but it covered a period of four years, and if the remedy was destroyed by the Act of 1906, a part or all of these claims should not have been allowed, but the recovery allowed in the State Court was affirmed in this Court, and that in an opinion subsequent to the Phillips case. In the lower court these cases were attempted to be distinguished on the ground that they did not apply to

interstate shipments and could not apply if the damage were one coming under the interstate commerce law, but numerous cases of the same character have been brought before and considered by this Court, and are of a character which could have been brought before the Interstate Commerce Commission on the identical claims. This is plainly shown by the decision of this Court in the case of Pennsylvania Rld. Co. vs. Steinman Coal Co., 242 U. S. 300, in which this Court held that the State Court had jurisdiction, but the case was reversed on the ground that in another case the identical rule on which the case was based had been declared unreasonable by the Commission, and therefore the shipper could not bring action in court and recover on it, but the principle is clearly demonstrated that these cases are of a character which can be tried either in the State Court, the United States Court, or before the Commission. In that regard we quote the following from this Court's opinion in the Steinman Coal Company case: (Page 299)

> "The coal company was engaged in coal mining on the carrier's line in Pennsylvania and was shipping the coal to points in that and other States. Other coal companies were engaged in like operations in the same district. A rule of the carrier provided for a pro rata distribution of the available supply of coal cars in times of car shortage, but did not require or contemplate that individual cars, owned or controlled by the shipper, should be charged against his distributive share. Without questioning the reasonableness of this rule, but, on the contrary, assuming that it was unobjectionable

and became the true measure of the shipper's right and the carrier's duty, the coal company claimed that the carrier had unjustly discriminated against it to its damage by furnishing it a smaller number of cars, and some of its competitors a greater number, than the rule contemplated or permitted. In other words, the claim was, not that the rule was discriminatory, but that it was violated or unequally enforced by the carrier. Of such a suit we said in Penn. R. R. Co. v. Puritan Coal Mining Co., 237 U. S. 121, 131-132, where the provisions of the Interstate Commerce Act were extensively considered: 'There is no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage. Such suits, though against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the State or Federal courts.' Adhering to this view, we think the suit was properly brought in a state court. See Penn. R. R. Co. v. Sonman Shaft Coal Co., ante, 120."

Therefore, under the contention made by counsel for the railroads, if the two year limitation applied to all cases which might come before the Commission or might be sued on in court originally, as has been ruled in the cases which are required to be brought in the first instance before the Commission, then the decisions above pointed out in the Puritan case and in the Sonman case are inconsistent with the interpretation contended for,

for if this rule is based upon the necessity for uniformity in all cases, then that limitation must apply to every case which might have been brought before the Commission even though it be brought in the State Court, but this is not the fact, because the court has permitted and does permit actions on claims more than two years old.

This contention is further confirmed by consideration of the case of Morrisdale Coal Co. vs. Penn. Railroad Co., 230 U. S. 304, in connection with the cases of Penn. Railroad Co. vs. Puritan Coal Co., 237 U. S. 121, and Penn. Railroad Co. vs. Sonman Coal Co., 242 U. S. 120. In the Morrisdale case the plaintiff was attacking not the method of distribution of cars under the car distribution rules, but was attacking the rules themselves. In each of the other cases referred to the plaintiff was attacking not the rules, but the method of distribution under the rules. In the Morrisdale case the court held that the Interstate Commerce Commission had primary, original, exclusive jurisdiction. The proceedings were commenced originally, however, in court and the request of the court was made that the case be not dismissed but held in abeyance while application could be made to the Commission for an administrative ruling, but the court denied this application on the ground that the period of limitation for proceedings before the Commission had expired and the Commission would have no jurisdiction to grant any relief on the particular shipment sued on in that case, the court saying:

"It is argued in the plaintiff's brief that if this view of the law should be sustained the case should not be dismissed, but stayed until the plaintiff could apply to the Commission and obtain a ruling on the question as to whether the method adopted by the Pennsylvania Railroad was not, during the years 1900 to 1906 unjustly discriminatory. Attention is called to Southern Ry. v. Tift, 206 U. S. 428, 434, which it is said would support such a provision in the mandate. In that case the shippers filed, on April 14, 1903, a bill to enjoin an advance in rate. The injunction was refused and the advance went into effect. The cause was stayed while the complainants were pressing their application for an order from the Commission that the rates were unreasonable. Its report was in their favor and on it the Circuit Court made an order of restitution (206 U. S. 436). But in that case the statute of limitations had not run when the bill was filed, when the stay order was granted, nor when the application was made to the Commission; while in the present case the plaintiff was barred of the right to apply to the Commission at the date the suit was filed in the United States Circuit Court. The damages which were claimed arose from a failure to deliver cars prior to Dec. 31, 1905. The suit was brought July 17, 1908, more than two and a half years later and after the passage of the act of June 29, 1906, 34 Stat. 584, 590, that 'all complaints for the recovery of damages shall be filed with the Commission

> within two years from the time the cause of action accrued and not after, and a petition for the enforcement of an order shall be filed in the Circuit Court within one year from the date of the order and not afterwards; provided, that claims accrued prior to the passage of this act may be presented within one year.'
>
> "The provisions of this statute would prevent the modification asked for, and the judgment is affirmed."

From this case, taken in conjunction with the Puritan case and the Sonman case, which latter cases were proceedings directly in court without prior application to the Commission, it will be seen that the court permitted recovery for more than the two-year period prior to commencement of the actions, holding that no prior proceedings before the Commission were necessary.

In the Morrisdale case, however, the Court says that prior action by the Commission is necessary, and that the claims are barred. The practical result of these cases is therefore that the two year limitation has not in fact been applied to actions in Court, except in those cases where primary action of the Commission is necessary, but in all cases where the original jurisdiction in the Courts has been sustained, recovery for more than a period of two years has been permitted, and such recovery has been affirmed in this Court in decisions subsequently to the Phillips case in which the Court says that after the two years the liability is destroyed, and upon which case the later decision in the Wolf case has been rendered. We, therefore, submit that in the light of this practical construction which has been given this

statute, and there has been no change in the language as far as this question is concerned since the amendment of 1906, that the question should be reconsidered. The ordinary rule heretofore applied is that, where the United States statute is silent, the state statute of limitations shall govern. Is it the purpose that the state statute shall govern in those cases like the Puritan Coal Company and the Sonman Coal Company where the Court holds that the action may be commenced in the State Courts, and that the two year period shall apply only to actions in the United States Court and before the Commission? The statute is silent as to the limitation before any Court, and it is only by reason of the rule of uniformity that the period of limitation prescribed before the Commission is made to apply in any Court. If it had been the intent of the Congress to prescribe this limitation in the Courts would it not have specifically so provided, and certainly if the rule of uniformity is controlling it should apply to interstate shipments in the State Court as well as in the United States Court.

We respectfully submit that the rule should only be enforced as to those cases in which primary action must be brought before the Commission.

VIII.

THE INTERSTATE COMMERCE COMMISSION 4TH SECTION ORDER MADE IN CONNECTION WITH THE GENERAL ADVANCE IN RATES.

In the argument of these cases in the Circuit Court of Appeals there was presented a brief by Ben C. Dey as amicus curiae in which he attempted to raise the ques-

tion that the Interstate Commerce Commission had legalized all of the violations of the long and short haul clause. The order in question was made by the Interstate Commerce Commission when the general advance in rates in June, 1918, was permitted, and this order was necessary to permit the advance because of the increase in the measure of certain long and short haul violations which had been permitted by the Commission, and also because the rule adopted with reference to the disposition of fractions created some small violations which were necessary to be covered.

This question was not raised in the District Court and the Circuit Court of Appeals refused to consider it. (Tr. 594, Page 156.) But it has now been referred to in the brief of plaintiffs in error. We think our brief before the Circuit Court of Appeals covers the matter and we will embody here what was said on this subject in the Circuit Court of Appeals in view of the haste with which this brief is required to be prepared.

It is next contended that the increase in rates made by General Order 28, and the order of the Commission permitting these increases to go into effect, and permitting them to violate the long and short haul clause insofar as necessary to permit the increase to go into effect, had the effect of legalizing all violations of the long and short haul clause, irrespective of whether or not the particular violation was caused by the increase in rate or whether it had existed prior thereto and without any order of the Commission permitting the same. In other words, that this order of the Commission was a general carry-all legalization which had the effect of doing away with the prohibition of the long and short

haul clause as far as the Railroad Administration was concerned.

This question, we submit, can have no bearing in this court in these cases for the reason that it is not raised by the record. It does not appear on the face of the complaint, was therefore not raised by the demurrer to the complaint, and was not pleaded in the answer. Counsel seems to be acting on a sort of general assumption that without any pleading, this court will consider any order of the Interstate Commerce Commission on the basis that the court will take judicial knowledge of the orders and reports of the Interstate Commerce Commission. This is not the case. In order to justify their actions under any such orders of the Commission, the plaintiff in error must have pleaded the same. Having failed to plead the same, he waived any right thereunder. The question of the effect of judicial notice of the acts of the Interstate Commerce Commission was considered by the Supreme Coourt of the United States in Robinson vs. B. & O. Railroad Company, 222 U. S. p. 511, where the court says:

> "The next question to be considered is, whether judicial notice should have been taken of the decision of the Commission in Glade Coal Co. v. Baltimore & Ohio Railroad Co., wherein, as it is said, the rate here in question was found to be unjustly discriminatory and the railroad company was directed to desist from its enforcement. The decision was rendered April 28th, 1904, and authoritatively published in 10 I. C. C. No. 226, *but was not mentioned in the pleading or in the agreed statement of facts.* In the Supreme Court of Appeals of the

State it was contended that the decision should have been judicially noticed by the trial court, but the contention was rejected, and that ruling is now challenged as contravening the provision in Sec. 14 of the act (25 Stat. 855), which reads: 'The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained, in all courts of the United States, and of the several States without any further proof or authentication thereof.'

"Undoubtedly, this provision makes the decisions of the Commission, as so published, admissible in evidence without other proof of their genuineness, but it does not require that they be judicially noticed or relieve litigants from offering them in evidence as they would any other competent evidence intended to be relied upon. Its purpose is to relieve litigants from the inconvenience and expense of obtaining certified copies of the decisions by authorizing the use of the published copies, but it does not otherwise change the rules of evidence. The ruling, therefore, was not in contravention of the statute."

If counsel intended to rely upon any order of the Interstate Commerce Commission as a justification, he should have pleaded the same, and proved it. The judicial notice which the court takes is of the published records of the Commission and his proof would not have had to have been certified, but these orders of the Com-

mission do not have the force and effect of a public statute which any court may take into consideration and apply at any stage of the proceeding without being pleaded or the proof incorporated in the record. This is an appellate court, and counsel is attempting to inject certain proof in this court not offered in the lower court.

But even aside from the question that the point was not raised by the pleadings or proof, we submit that the alleged relief from the Fourth Section has not the general carry-all effect that counsel contends for it. The Federal Control Act, Sec. 10, 40 Stat. at Large, 451, provides:

> "Sec. 10. That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws, or at common law, except insofar as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal Court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control or of any Act of Congress

or official order or proclamation relating thereto shall upon motion of either party be retransferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any propery under such Federal control."

The only provision relieving the Railroad Administration from the regular provisions of the Interstate Commerce Act is that the Commission shall not suspend any rates or fares pending final determination.

The Railroad Administration was subject to the long and short haul clause the same as the carrier itself. It could not violate the long and short haul clause except after having first applied to the Commission and obtained its order relieving it in special cases from the operation of the long and short haul clause. There was no pretense that any such application was made permitting the Railroad Administration to charge less for hauling sugar from San Francisco to North Portland than to Portland. When the rates were increased by General Order 28, it was a general increase of 25 per cent on all rates, and where certain violations of the long and short haul clause existed before, these violations were increased by the increase in rates.

Furthermore, certain violations of the long and short haul clause were created by this order in the split of fractions in figuring the rates, and the application to the Commission was for the purpose of permitting this increased rate to go into effect and to be relieved from the Fourth Section of the Act to Regulate Commerce insofar as was necessary to permit this increase to go into effect. There were no other special circumstances before the Commission, and no other special applications

were made to the Commission, and no other special permission was granted to the carrier to violate the Fourth Section. It was permission only to the extent necessary to permit the increased rates to go into effect, and that was all that was granted by the Commission.

As the Railroad Administration was subject to the Act to Regulate Commerce as shown by Section 10 of the Federal Control Act, a general order of the Commission without evidence and finding thereon would not relieve or legalize a violation of the section theretofore in existence not authorized. The court will note the reading of the proviso of the Fourth Section:

> "Provided, that upon application to the Commission, such common carrier *may in special cases after investigation* be authorized to charge less for a longer than for a shorter distance for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section."

And this Court has stated in U. S. vs. Merchants Association, 242 U. S. 187, that this clause "was designated to guard against the issue by the Commission of general orders suspending the long and short haul clause, and to insure action by it separately in respect to particular carriers, and only after consideration of special circumstances existing."

The amicus curiae is seeking to have an order, which had no relation to this particular violation of the long and short haul clause but which did have relation to a general advance in rates, considered as a carry-all and

general order to legalize all violations of the long and short haul clause, which is contrary to the interpretation placed thereon by the Supreme Court. Counsel seems to take solace in the fact that in the case just cited, there were a great many carriers involved, but the characters of the violations which were under consideration were all of a particular kind, evidence had been offered before the Commission as to what they were, and the order of the Commission, after considering the circumstances, laid down the basis on which, and the extent, to which, those carriers could charge more for the long than for the short haul. It was a special case, specially and thoroughly investigated, and a particular order entered therein. But amicus curiae is seeking to have an order having no relation to this particular violation on which no evidence with reference to this violation was offered construed into legalizing and authorizing this particular violation. It can't be done.

IX.

MEASURE OF DAMAGES

The carriers are contending that the difference between the rate to North Portland and to Portland is not the measure of damages but we submit that under the law the North Portland rate is the only rate which can be applied, as the higher rate to Portland did not exist, as pointed out under the decision of Mr. Chief Justice Brewer in the case of United States vs. Louisville & Nashville, 235 U. S. 314, and hence any sum in excess of said North Portland rate was illegally exacted.

The Circuit Court of Appeals for the 9th Circuit has applied this rule in California Adjustment Co. vs. S. P., 237 Fed., 954, and the Supreme Court of Cali-

fornia has likewise adopted this as the measure of damages in California Adjustment Co. vs. A. T. & S. F., 185 Pac., 282.

The language of the Supreme Court of Kentucky in the case of Louisville & Nashville vs. Walker, 110 Ky. 961, 63 S. W. 20, cited in S. P. Co. vs. Cal. Adjustment Co., 237 Fed. 960, is very pertinent, to-wit:

> "As one means of protecting the legal shipper this section fixed a maximum limit beyond which he should not be charged. It was thus made unlawful for the carrier to charge a greater compensation for the same service for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance. When the charge for the longer haul is fixed, to charge more for the shorter haul is just as clearly illegal as it would be to charge a greater sum than the law allowed where the law itself fixed a sum as the limit of charge. The carrier is allowed by the constitution to fix a rate for the longer haul, but when he so fixes it, this rate is the limit beyond which he cannot go in charging for the same service in the shorter haul, and when appellant exacted of appellee more than it could legally charge, his right to recover the excess so paid is precisely similar to the right to recover for any other illegal exaction. He whose money is taken from him illegally is to that extent damaged. It is not necessary for appellee to show anything more than that he was compelled to pay more than appellant had a right to

charge. To illustrate, if it had been provided by statute that appellant should charge no more for hauling tobacco than it charged for hauling other like freight, and appellant while it charged 20 cents per hundred for hauling like freight had charged appellee 29 cents per hundred for hauling his tobacco, it would be clear that 9 cents per hundred had been taken from appellee in violation of law, and it would be no defense for appellant to say that appellee was being prejudiced by its giving lower rates to other freight and it did not hurt him in any way that other people were charged less than they ought to have been charged, for in such a case the excessive charge for carrying tobacco would be illegal."

It is true that the Interstate Commerce Commission in the cases pointed out by the brief of plaintiffs in error, has refused to follow this rule, basing their decision upon the decision of this Court in Pa. R. R. Co. vs. International Coal Co., 230 U. S., 184. That case, however, was not one for recovery of damages which were specifically provided by statute, but was an action for damage by one person who had been receiving a rebate on account of the fact that another shipper had received a greater rebate than he, and it was attempted to be claimed that his measure of damages was the difference in the two rebates but the Court held as neither person was claiming under a legal rate he could only recover such damages as he could prove by reason of the fact that the other shipper had received a greater rebate. That, we submit, is not proper authority to refuse to grant the difference in the rate charged over that which the stat-

ute says shall not be exceeded. The measure of damages is prescribed by the statute. In the present case the carriers have taken a certain amount more than the statute says they could take. The measure of damages is certainly the difference between this amount and the amount which they did charge.

The distinguishing feature of the International Coal case is pointed out by the Circuit Court of Appeals of the 9th Circuit in California Adjustment Co. vs. S. P., 237 Fed., 965, and in the later case in this Court of Southern Pacific Company vs. Darnell Taenzer, 245 U. S., 534, this Court likewise distinguishes the International Coal case in the following language:

> "The cases like Pennsylvania Railroad Co. vs. International Coal Mining Co., 230 U. S., 184, where a party that has paid only the reasonable rate sues upon a discrimination because some other has paid less, are not like the present. There the damage depends upon remoter considerations. But here the plaintiffs have paid cash out of pocket that should not have been required of them, and there is no question as to the amount of the proximate loss."

So in the present case the plaintiffs' assignors have paid out of pocket an amount which the statute said should not be exacted of them and their damages are definitely fixed by the statute.

X.

ATTORNEY'S FEES IN THIS COURT

If the judgment of the lower court is sustained, we respectfully submit that this Court should assess as part of the costs, attorney's fees in this Court. Section 8 of the Act provides for the assessment of a reasonable counsel's or attorney's fee to be fixed by the court in every case of recovery, which fees shall be taxed and collected as part of the costs in the case. The District Court limited the attorney's fees to the fees in that court. The Circuit Court made an additional allowance for fees in that court and we suggest that similar allowance be made in this Court. This seems to be the practice outlined in Mills vs. Lehigh Valley, 226 Fed., 812, and N. Y. N. H. & H. vs. Ballou & Wright, 242 Fed., 862.

We therefore submit that the judgment of the Circuit Court of Appeals should be affirmed with the addition of attorney's fees in this Court.

Respectfully submitted,

JAMES G. WILSON,

Attorney for Defendants in Error.

N. B.—The foregoing brief has been very hastily prepared. Our information was that these cases would be reached about the last of November. At noon Thursday, October 11th, we were advised the case would likely be heard October 18th or 19th. We necessarily had to have this brief complete in the printer's hands by noon of the 12th. We offer this by way of explanation of any errors or lack of full discussion.

No. 122

FILED
SEP 20
WM. R. STA

In the Supreme Court of the United States

OCTOBER TERM, 1922

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a corporation,
Plaintiff in Error
vs.
A. J. PARRINGTON,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. [redacted]123

JAMES C. DAVIS, Agent, United States Railroad Administration,
Plaintiff in Error,
vs.
A. J. PARRINGTON,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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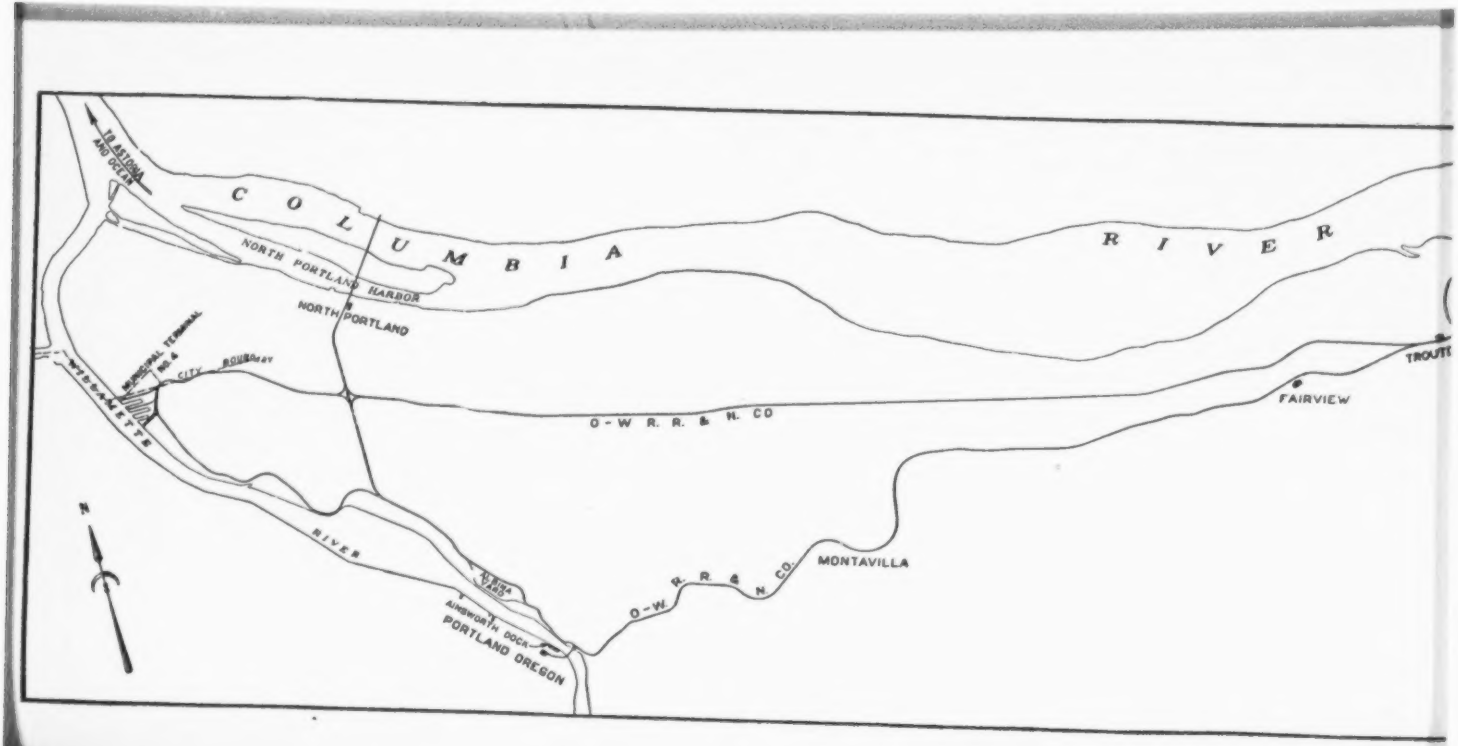
TO ASTORIA AND OCEAN
COLUMBIA RIVER
NORTH PORTLAND HARBOR
NORTH PORTLAND
MUNICIPAL TERMINAL NO. 4
CITY
BOULEVARD
WILLAMETTE
RIVER
O-W R. R. & N. CO
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PORTLAND OREGON
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In the Supreme Court of the United States

OCTOBER TERM, 1922

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a corporation,
Plaintiff in Error
vs.
A. J. PARRINGTON,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 573

JAMES C. DAVIS, Agent, United States Railroad Administration,
Plaintiff in Error,
vs.
A. J. PARRINGTON,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

STATEMENT OF CASE

These two actions were tried together in the District Court of the United States for the District of Oregon, consolidated for hearing in the Circuit Court of Appeals, and application will be made for consoli-

dation in this Court. The same questions are involved in both actions, and therefore it seems appropriate that they be briefed jointly.

Both actions were brought in the District Court of the United States for Oregon by Defendant in Error, whom we shall hereafter refer to as "the plaintiff", on claims assigned to him by various shippers. No prior application was made to the Interstate Commerce Commission for relief. The actions involve alleged violations of the long and short haul clause (Section 4) of the Act to Regulate Commerce, in respect of shipments wholly by water from San Francisco, California, to Portland and Astoria, Oregon, before, during and after Federal control of railroads.

The water carrier involved is The San Francisco and Portland Steamship Company, which for brevity we shall hereafter call "The Steamship Company". Its stock is owned by Oregon-Washington Railroad & Navigation Company, an interstate rail carrier. Therefore, under the terms of the Act of Congress of August 24, 1912, entitled "An Act to provide for the opening, maintenance, protection and operation of the Panama Canal, and the sanitation and government of the Canal Zone", (37 Stat. L. 566), if the Steamship Company did or might compete with the Railroad Company, it was necessary for the rail carrier to secure permission from the Interstate Commerce Commission to continue ownership and operation of the Steamship Company after July 1, 1914. Such an application was made and granted, and, it is contended, thereby the Steamship Company submitted to the requirements of the Panama Canal Act, that "the rates, schedules and practices of

such water carrier shall be filed with the Interstate Commerce Commission and shall be subject to the Act to Regulate Commerce and all amendments thereto in the same manner and to the same extent as is the railroad or other common carrier controlling such water carrier."

The period involved begins May 10, 1916, and ends April 30, 1921. During that period the Steamship Company's vessels were under corporate control from May 10, 1916, to October 15, 1917. On the latter date all the Steamship Company's vessels were requisitioned by the United States Shipping Board and the Steamship Company directed to continue to operate them "for account of the Government". A charter of the vessels to the Shipping Board was later executed as of that date. On May 24, 1918, the Shipping Board gave to the Steamship Company "five days' notice of the cancellation of the requisition charter", and "that on and after May 29th the Shipping Board will be under no responsibility whatsoever with respect to said vessels". On May 30, 1918, the Director General of Railroads assumed control over the Steamship Company and its vessels and continued in control until March 1, 1920, the date of termination of Federal control of railroads.

The gravamen of plaintiff's suits is that the Steamship Company and Oregon-Washington Railroad & Navigation Company (and during Federal control the Director General) had on file with the Interstate Commerce Commission certain joint water and rail tariffs naming rates on sugar from San Francisco to North Portland, Oregon, which were lower than the rates charged plaintiff's assignors on similar shipments from San Francisco to Portland and Astoria. The com-

plaints assert that Portland and Astoria are intermediate to North Portland and that therefore the long and short haul clause of the Commerce Act (Section 4) was violated. The defendants admit that Astoria is an intermediate point between San Francisco and North Portland, but deny that Portland is intermediate.

The particulars of the claims are as follows: Prior to May 10, 1916, a rate of 12½c per hundred pounds on sugar from San Francisco to Portland and Astoria was carried in the Steamship Company's local tariff and a similar rate was named on sugar from San Francisco to North Portland in a joint water and rail tariff promulgated by Oregon-Washington Railroad & Navigation Company and the Steamship Company. On May 10, 1916, the rates to Portland and Astoria named in the Steamship Company's local tariff were increased to 15c. Through oversight, or for some other reason not disclosed, no corresponding increase was made in the rates to North Portland named in the joint water and rail tariff. On June 25, 1918, the Director General of Railroads by his General Order No. 28 increased the rates of all carriers throughout the United States by twenty-five per cent. The rate to Portland and Astoria carried in the Steamship Company's local tariff was thus increased to 19c and the rate to North Portland named in the joint water and rail tariff to 15½c. No changes were made in these rates until August 26, 1920, (after Federal control), when the Commission granted a second general increase of twenty-five per cent. to all carriers in the Pacific territory. The rates to Portland and Astoria were correspondingly increased to 24c and the rate to North Portland to 19½c and these

rates were not again changed up to the time the complaints were filed.

An inspection of the map attached to the fly leaf of this brief is necessary to an understanding of the location of Portland and North Portland. Portland is located on the Willamette River, about twelve miles above its confluence with the Columbia River. North Portland is located on Oregon Slough, a navigable arm of the Columbia River, and is about four miles above the confluence of the Willamette and Columbia. To reach Portland, vessels must pass the mouth of Oregon Slough, thus passing the docks at North Portland at a distance of about four miles. It is also necessary for such vessels to pass Municipal Terminal No. 4, from which shipments to North Portland may be transported by rail over the lines of the Oregon-Washington Railroad & Navigation Company. The customary route for the Steamship Company's vessels is to land at Ainsworth Dock, in the heart of the City of Portland, but this is a matter of Company convenience and there is no physical obstacle which would prevent the vessels from landing first at North Portland or at Municipal Terminal No. 4.

Plaintiff's assignors are wholesale grocers and sugar merchants who transport sugar in large quantities to Portland and there sell to the retail trade. They have no competitors at North Portland, there being at that point only one user of sugar—a meat packing plant which uses a limited amount of sugar in its packing process. The evidence discloses no shipments of sugar from San Francisco to North Portland and the rates named in the joint water and rail tariffs were merely

paper rates. Presumably the meat packing plant at North Portland purchases its sugar from plaintiff's assignors.

The assignments under which plaintiff claims are in ordinary form and do not attempt to comply with the provisions of Section 6383, U. S. Compiled Statutes of 1916, relating to assignments of claims against the United States. Neither plaintiff nor his assignors applied to the Interstate Commerce Commission for any form of relief, but on February 12, 1921, plaintiff began his two suits in the District Court of the United States for the District of Oregon. His complaints recite the history of the rates to Portland, Astoria and North Portland, as heretofore set out; allege that the Portland and Astoria rates violated Section 4 of the Act to Regulate Commerce, and pray judgment for the difference between the Portland and Astoria rates and those to North Portland. The theory of the suits is money had and received. The complaints do not allege that the Portland and Astoria rates were unreasonable nor that plaintiff's assignors were damaged in any way except that they paid the tariff rates to Portland and Astoria, which were higher than the rates to North Portland. No evidence of unreasonableness of any of the rates was offered nor any evidence of damage other than the payment of the rates.

Demurrers were interposed by defendants, challenging the jurisdiction of the District Court and, in the Steamship Company's case, challenging the sufficiency of the complaint and setting up that action on those claims arising prior to January 1, 1918, was not commenced within the time limited by the Act to Regu-

late Commerce and the laws of the State of Oregon. These demurrers were overruled and the defendants answered. The Steamship Company denied it was in control of its vessels between October 12, 1917, (this should have been October 15, 1917, the date the Shipping Board requisitioned the vessels) and the termination fo Federal control, or that it collected any sums from plaintiff's assignors during that period. The Director General denied that he operated the vessels prior to May 30, 1918, (the day after the Shipping Board requisition charter was cancelled) or that he collected any charges from plaintiff's assignors prior to that date. The Steamship Company also set up the bar of the two-year limitation in the Act to Regulate Commerce against claims on shipments moving and charges paid prior to Federal control, and further pleaded that the charges collected after Federal control and before August 26, 1920, were in accordance with the rates shown in the Director General's tariffs at the termination of Federal control, and that the rates collected from and after August 26th were on the basis of the Director General's rates plus the twenty-five per cent. increase ordered by the Interstate Commerce Commission, effective on that date.

Judgments were returned in favor of the plaintiff as follows:

Against the Steamship Company for $11,380.69, of which $2648.64 was on shipments moving prior to January 1, 1918, and included shipments moving during the time the vessels were operated under the Shipping Board charter, and $8732.05 on shipments moving after Federal control. Interest was allowed and $2000.00 as

attorney's fees. The attorney's fees were later increased by $1000.00 in the Circuit Court of Appeals.

Against the Director General for $7339.06, on shipments moving between January 1, 1918, and March 1, 1920, the period of Federal control of railroads, and including shipments moving between January 1, 1918, and May 29, 1918, the date of termination of the Shipping Board requisition charter. Interest was also allowed, and $1500.00 as attorney's fees, which latter sum was increased by $600.00 in the Circuit Court of Appeals.

The Circuit Court of Appeals for the Ninth Circuit affirmed the judgments and allowed further attorney's fees in the sums stated (281 Fed. 10). The cases are brought to this Court on writ of error.

POINTS AND AUTHORITIES

I.

Under the terms of Section 15 of the Interstate Commerce Act, as amended in 1910 and 1920, transportation wholly by water is not subject to the Act, notwithstanding the provisions of the Panama Canal Act.

Section 15, Interstate Commerce Act, 36 Stat. L. 552.

Transportation Act of 1920, Sec. 408, 412, 413, 418; 41 Stat. L. 482, 483, 485.

Fed. Stat. Ann. 1920 Sup. pages 104, 105, 106.

Panama Canal Act, 37 Stat. L. 560, 566.

Knickerbocker Ice Co. vs. Stewart, 253 U. S. 149, 160, 164.

Lewis' Sutherland Statutory Construction, 2nd Ed. Vol. 2, page 667.

II.

Assignments of claims against the Director General not complying with Section 3477, Revised Statutes, are void.

Section 3477, Revised Statutes.

Spoffard vs. Kirk, 97 U. S. 484.

National Bank vs. Downie, 218 U. S. 345.

Mo. Pacific R. Co. vs. Ault, 256 U. S. 554.

Seaboard Air Line vs. U. S. 256 U. S. 655.

III.

No liability can attach either to the Steamship Company or the Director General on shipments moving during the time the Steamship Company's vessels were being operated by the Shipping Board.

Mo. Pacific R. Co. vs. Ault, 256 U. S. 554.
Davis, Director General, vs. Zirkle, 138 N. E. 266.

IV.

The District Court was without jurisdiction, exclusive original jurisdiction being lodged in the Interstate Commerce Commission.

Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S. 426.

Baltimore & Ohio R. Co. vs. Pitcairn Coal Co., 215 U. S. 481.

Robinson vs. Baltimore & Ohio R. Co., 222 U. S. 506.

Mitchell Coal & Coke Co. vs. Pennsylvania R. Co., 230 U. S. 247.

Morrisdale Coal Co. vs. Pennsylvania R. Co., 230 U. S. 304.

Texas & Pacific Ry. Co. vs. American Tie Co., 234 U. S. 138.

Northern Pacific Ry. vs. Solum, 247 U. S. 477.

Director General vs. Viscose Co., 254 U. S. 498.

Pennsylvania R. Co. vs. International Coal Co., 230 U. S. 184.

Pennsylvania R. Co. vs. Puritan Coal Co., 237 U. S. 121.

Pennsylvania R. Co. vs. Sonman Coal Co., 242 U. S. 120.

St. Louis etc. R. R. Co. vs. Hasty, 255 U. S. 252.

V.

Section 4 of the Interstate Commerce Act, (the long and short haul clause), is a statute relating to a form of discrimination and not one merely declaring the intermediate rate unlawful.

Parsons vs. C. & N. W. Ry. 167 U. S. 447.

Fourth Section, Interstate Commerce Act.

VI.

Discrimination may be removed either by raising one rate, lowering the other, or changing both, and the fact that a rate discriminates against one locality in favor of another one does not in itself entitle the first locality to the same rate as the tariff provides for the second.

American Express Co. vs. Caldwell, 244 U. S. 617.

St. Louis etc. Ry. Co. vs. U. S. 245 U. S. 144.

Hillsborough Mills vs. Boston & Maine R., 269 Fed. 816.

VII.

Section 6 of the Interstate Commerce Act requires carriers to collect the rates published in their tariffs and forbids transportation except when an applicable rate is contained in a published tariff. In view of this section the carriers were compelled to collect their published rates or refuse to accept the commodities for shipment.

Section 6, Interstate Commerce Act.

Section 4, Interstate Commerce Act.

VIII.

Under Section 6 the carriers must collect their published rates, even though they are violative of other sections of the Act.

Armour Packing Co. vs. U. S. 209 U. S. 56.

P. C. C. & St. L. vs. Fink, 250 U. S. 577.

Keogh vs. C. & O. R. R. Co., 43 Supreme Court Reporter, 47.

Pennsylvania R. Co. vs. International Coal Co., 230 U. S. 184.

Poor Grain Co. vs. C. B. & Q. R. Co., 12 I. C. C. 418.

Interstate Remedy Co. vs. American Express Co., 16 I. C. C. 436.

Crescent Coal & Mining Co. vs. C. & E. I. R. Co. 24 I. C. C. 149.

IX.

Under plaintiff's theory that the rates to Portland were not legally published rates, there were no legally published rates at all—the transportation must therefore have been unlawful, and the courts will not aid shippers in collecting any part of the charges which they paid.

Payne vs. Bassett, 235 S. W. 917.

X.

The mere fact that a rate is violative of the long and short haul clause of the Interstate Commerce Act

does not entitle shippers to an intermediate point to recover the excess over the rate to the more distant point.

Parsons vs. C. & N. W. R. Co., 167 U. S. 447.
International Coal Co. vs. Pennsylvania R. Co., 230 U. S. 184.
Iten Biscuit Co. vs. C. B. & Q. R. Co., 53 I.C.C. 729.
Topeka Banana Dealers' Assn. vs. St. L. etc. R. Co., 13 I.C.C. 620.

XI.

The long line of decisions of the Interstate Commorce Commission in Fourth Section violation cases holding that mere proof of the difference in the rates is no evidence of damage, should be followed by this court, because not manifestly incorrect.

Heath vs. Wallace, 138 U. S. 573.
U. S. vs. Cerecedo, 209 U. S. 337.

XII.

Section 10 of the Federal Control Act, and the Transportation Act of 1920, lodged exclusive original jurisdiction of cases against the Director General involving violations of the Interstate Commerce Act in the Interstate Commerce Commission.

Section 10, Federal Control Act, 40 Stat. L. 451.
Northern Pacific R. Co. vs. North Dakota, 250 U. S. 135.

Alabama & Vicksburg Ry. Co. vs. Journey, 42 Supreme Court Reporter 6.

Transportation Act of 1920, Section 206 (c) 41 Stat. L. 462.

25 R. C. L. 1010.

Phillips vs. Grand Trunk Ry., 236 U. S. 662.

Kansas City Sou. R. Co., vs. Wolf, 43 Supreme Court Reporter, 259.

Mo. Pac. R. Co. vs. Ault, 256 U. S. 554.

XIII.

No violation of the Fourth Section was proved, because the evidence showed that there was no transportation to the more distant point, the rate being merely a paper rate.

Section 4, Interstate Commerce Act.

Parsons vs. C. & N. W. Ry., 167 U. S. 447.

Judson on Interstate Commerce, 3rd Ed. page 529.

Topeka Banana Dealers' Assn. vs. St. L. etc. R. Co., 13 I.C.C. 620.

Anaconda Copper Mining Co. vs. Director General, 64, I.C.C. 136.

Lehigh Valley R. Co. vs. Rainey, 112 Fed. 487.

XIV.

There was further no violation of the Fourth Section because the rates to Portland and Astoria were local rates and the paper rates to North Portland were joint rates.

Chi. & N. W. R. Co. vs. Osborne, 52 Fed. 912.

U. S. vs. Mellen, 53 Fed. 229.

I. C. C. vs. C. etc. R. Co, 56 Fed 925-162, U. S. 184.

Allen & Lewis vs. O. R. & N. Co., 98 Fed. 16.

Parsons vs. C. & N. W. R. Co., 167 U. S. 447.

XV.

During Federal control rates were initiated and maintained under order of the President, and the Fourth Section of the Commerce Act was therefore inapplicable to them.

Section 10, Federal Control Act, 40 Stat. L. 451.

Northern Pacific Ry. vs. North Dakota, 250 U. S. 135.

Missouri Pacific R. Co. vs. Ault, 256 U. S. 554.

Alabama, etc. R. Co. vs. Journey, 42 S. C. R. 6.

XVI.

If there was a departure from the Fourth Section it was covered by appropriate orders of the Commission.

Interstate Commerce Commission, Fourth Section Orders 7316 and 7601.

XVII.

The carriers were required during the first six months after Federal control to collect the rates which

they found in the Director General's tariffs, whether they conformed to the Fourth Section or not.

Transportation Act, Section 208 (a), 41 Stat. L. 464.

Wasatch Coal Co. vs. Baldwin, 208 Pac. Utah, 1109.

Public Service Commission vs. New York Central, 185 New York Supplement, 268.

XVIII.

The measure of damages in Fourth Section cases is not the difference between rates.

Parsons vs. C. & N. W. R. Co., 167 U. S. 447.

Pennsylvania R. Co., vs. International Coal Co., 230 U. S. 184.

Hillsborough Mills Co. vs. Boston & Maine R. Co., 269; Fed. 816.

Homestead Coal Co. vs. Des Moines Elec. Co., 226 Fed. 49.

Atchison etc. R. Co. vs. Spiller, 246 Fed. 1, 20.

Clark Bros. Coal Mining Co. vs. Pennsylvania R. Co., 238 Fed. 642.

Lehigh Valley R. Co., vs. American Hay Co., 219 Fed. 539.

XIX.

All claims antedating February 12, 1919, are barred because not brought within two years.

Section 16 Interstate Commerce Act.

Phillips vs. Grand Trunk Ry. Co., 236 U. S. 662.

Kansas City South R. Co. vs. Wolf, 43 S. C. R. 259.

Transportation Act, Section 206 (f) 41 Stat. L. 462.

Eberhart vs. U. S. 204 Fed. 884.

ARGUMENT.

DOES COMMERCE ACT APPLY TO SHIPMENTS WHOLLY BY WATER?

As the transportation involved in these cases was wholly by water, the question at once arises whether Section 4 of the Commerce Act applied to it.

Section 15 of that Act was amended in 1910 (36 Stat. L. 552) so as to read in part as follows "nor shall the Commission have the right to establish any route, classification, rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water." The Transportation Act of 1920 re-enacted this provision and added the words "or practice or" after the word "classification."

The theory of the complaints is that Section 4 of the Commerce Act applies to all the Steamship Company's transportation because the railroad owner of the Steamship secured permission under the Panama Canal Act to continue such ownership. If this theory is unfounded, there is no basis for these suits.

The first paragraph of Section 11 of the Panama Canal Act of August 24, 1912 (37 Stat. L. p. 560, 566) amended Section 5 of the Commerce Act by adding a clause forbidding railroads after July 1, 1914, to own or control water carriers which "do or may compete with such railroads." Then follow two paragraphs which were not declared to amend the Commerce Act. They provide that the Interstate Commerce Commission shall determine whether competition does or may exist and,

if it believes the public interest requires it, may "extend the time during which such service by water may continue to be operated beyond July 1, 1914," and further that "In every case of such extension the rates, schedules and practices of such water carrier shall be filed with the Interstate Commerce Commission and shall be subject to the Act to Regulate Commerce and all amendments thereto in the same manner and to the same extent as is the railroad or other common carrier controlling such water carrier or interested in any manner in its operation."

On February 28, 1920, after the greater part of the shipments had moved and charges on them had been paid, the Transportation Act (41 Stat. L. 456, 482) amended the Commerce Act by adding the two paragraphs of the Panama Canal Act just mentioned to Section 5. The same Act re-enacted Section 15 of the Commerce Act with the addition which we have quoted.

These two statutes seem, on casual inspection, to be in conflict. If the Panama Canal Act is construed as intended to apply all of the terms of the Commerce Act to transportation wholly by water, the conflict is real, and one of the statutes must fall before the other. If such a conclusion is reached it can not be said that the provisions in the Panama Canal Act are the later expressions of Legislative will, since they were first added to the Commerce Act in 1920, which at the same time re-enacted Section 15.

If the Panama Canal Act makes Section 4 of the Commerce Act applicable to transportation wholly by water, it likewise makes the other sections of the Commerce Act applicable, including Section 15. Such transportation is therefore, under that view, made subject

to the Act by one section of the statute and not subject to the Act by another, an impossible situation.

The language of the two sections does not, however, require such a conclusion and a construction harmonizing the sections is entirely possible. The Panama Canal Act subjects the rates, schedules and practices of the water carrier to the Commerce Act only "in the same manner and to the same extent *as is the railroad* * * * controlling such water carrier"—not as are the rates, schedules and practices of the railroad, but *"as is the railroad."* Railroads are ordinarily subject to the Commerce Act, as to part of their business, and not subject as to part. A part of a railroad's business may be transportation wholly by water. As to such transportation it is not subject to the Commerce Act. It may also be engaged in transportation partly by water and partly by rail, under an arrangement for a continuous carriage. As to such transportation it is subject to the Act. It may likewise be engaged in transportation partly by rail and partly by water, with no arrangement for a continuous carriage. In that event it is subject to the Commerce Act on the part of the transportation that is by rail, assuming it to be interstate, but not on the part that is by water. (Section 1, Commerce Act). A water carrier owned by a railroad may also be engaged in transporting commodities destined to move by rail from the water carrier's terminal over the lines of some railroad other than that of its owner without any arrangement for a continuous carriage. Nevertheless, as to such transportation, the water carrier would not be subject to the Act, whereas a railroad transporting commodities wholly within one state, as the first step in an interstate journey, would be subject to the Act with or without an arrangement for a continuous car-

riage. Under any view, a railroad may operate a boat line which does not and cannot compete with it, and as to transportation wholly by water by such boat line the railroad is not subject to the Act.

There are then various situations in which a water carrier engaged in transportation of commodities moving partly by rail from the water carrier's terminal is not subject to the Act, whereas, under similar circumstances, a rail carrier would be subject. Is it not then a reasonable conclusion that the Panama Canal Act was intended to apply the Commerce Act only to shipments partly by water and partly by rail, where for one reason or another the Commerce Act did not already apply? Viewed in this light, there is no conflict between the two acts.

This interpretation of the Panama Canal Act harmonizes with the whole scheme of the Commerce Act and is closely paralleled by the provisions of Section 6 Paragraph (13) as amended by the Transportation Act of 1920 (41 Stat .L. 483). Those paragraphs confer on the Commission jurisdiction over joint rail and water movements between points in the United States through the Canal or otherwise. They do not, however, give such jurisdiction over transportation wholly by water and it is difficult to conceive a reason for a different policy relating to railroad owned vessels.

If it be held that the Panama Canal Act subjects railroad owned water carriers to the Commerce Act as to all their interstate transportation, whether wholly by water, or otherwise, to the same extent as the railroad owners, absurb results follows. Liability for loss and damage to shipments must then be determined by the rule applied by Section 20 to railroads and not by

the laws applicable to transportation by water, and this notwithstanding Section 15. Railroads are required to furnish adequate facilities, including cars. So, under this view, it would follow that, if more business is offered than a water carrier can handle, it must purchase or charter additional vessels. Railroads are required to secure certificates of convenience and necessity before constructing new lines or abandoning old ones. It would follow that water carriers must secure similar certificates before adding to their ports of call, or eliminating ports of call, or going out of business. Other provisions of the Commerce Act are equally inapplicable to transportation by water.

If Section 20 of the Commerce Act applies to railroad owned water carriers, and liability for loss and damage to their shipments is governed by the Cummins' Amendment, then there are two widely different rules of liability, one applicable to shipments transported by railroad owned water carriers, and the other applicable to shipments transported by other water carriers. But this would have the effect of destroying the uniformity of maritime law throughout the United States, which this Court has held the Constitution established. Knickerbocker Ice Co. vs. Stewart, 253 U. S. 149, 160, 164.

If Section 15 of the Commerce Act and Section 11 of the Panama Canal Act are construed as in conflict, one of two results must follow. They both are void as neutralizing each other, or the one which is the latest expression of the legislative will must be deemed to repeal the other. Of course, until the paragraph extending the Commerce Act to the rates, schedules and practices of water carriers was made a part of Section 5 of the Commrce Act by the Transportation Act of 1920,

Section 15 remained in full effect. After the Transportation Act, the effect of the conflict between the two sections must be determined by the following rule laid down in Lewis' Sutherland Statutory Construction, 2nd Edition, Volume 2, page 667:

> "Where one part of an act is in conflict with another, and they cannot be brought into harmony by any rule of construction; where they are of equal scope, and there is a point-blank repugnancy so that if one operates at all it will necessarily antagonize any effect of the other, what is the consequence? Both are void, by one neutralizing the other, on the ground that the legislature uno flatu have enacted a contradiction; or one, for being earlier or later in position, must be deemed to render the other nugatory, or repeal it. The decisions are to the effect that the provision which is latest in position repeals the other."

THE ASSIGNMENTS OF CLAIMS AGAINST THE DIRECTOR GENERAL ARE VOID.

All of the claims involved in the suit against the Director General are held by plaintiff under assignments from various shippers. These assignments were, of course, purely voluntary and in no sense by operation of law, and therefore fall within the purview of Section 3477 of the Revised Statutes which reads in part as follows:

> "All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, * * * shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same."

In Spoffard vs. Kirk, 97 U. S. 484, this statute was thus interpreted by this court at page 490:

"However, that may be, the language of the Act is too sweeping and positive to justify us in giving it a limited construction. We can not say, when the statute declares all transfers and assignments of the whole of a claim, or any part or interest therein, and, all orders, powers of attorney, or other authority for receiving payment of the claim, or any part thereof, shall be absolutely null and void, that they are only partially null and void, and that they are valid and effective as between the parties thereto, and only invalid when set up against the Government.

It follows that, in our opinion, the accepted orders under which the appellant claims gave him no interest in the claim of the drawer against the United States, and no lien upon the fund arising out of the claim. His bill was, therefore, rightly dismissed."

And again at page 488:

"It would seem to be impossible to use language more comprehensive than this. It embraces alike legal and equitable assignments. It includes powers of attorney, orders, or other authorities for receiving payment of any such claim, or any part or share thereof. It strikes at every derivative interest, in whatever form acquired, and incapacitates every claimant upon the government from creating an interest in the claim in any other than himself."

In National Bank vs. R. E. Downie, 218 U. S. 345, this court further emphasized the finality of the prohibition against assignments in the following language at page 356:

> "If any regard whatever is to be had to the intention of Congress, as manifested by its words —too clear, we think, to need construction—we must hold such a transfer to be absolutely null and void, and as not, in itself, passing to the appellants any interest, present or remote, legal or equitable, in the claims transferred."

In Missouri Pacific R. R. Co. vs. Ault, 256 U. S. 554, it was held that the Director General of Railroads was the agency of the government for operation of the railroads and an arm of the government, and that "by these laws the validity and extent of claims against the United States arising out of the operation of the railroad were to be determined." (563.)

It is true that this court in Seaboard Air Line vs. U. S., 256 U. S. 655, held to be without the purview of the statute the transfer of all of the property of a Railroad Company to another Railroad Company pursuant to the statutes of two states providing that all of the first railroad's property should be transferred to the second. But that was an assignment by operation of law, whereas here we have a purely voluntary assignment.

In Parrington vs. Davis, 285 Federal 741, the District Court of the United States for Oregon held the statute inapplicable on the authority of Missouri Pacific R. R. Co. vs. Ault, 256 U. S. 554, but as we read the Ault case it does not deal with the question.

There is no doubt that the claims are against the United States, that the assignments were voluntary, and that there is no specific provision of any statute

authorizing such assignments. The evil at which the statute was directed is present in as great measure in respect to these claims as in respect of other claims against the United States.

It is, of course, no answer to say that the invalidity of the assignments is not pleaded by the defendants because the statute makes such assignments void and the complaints setting out the fact of the assignments therefore did not state a cause of action, and the evidence showing the assignments disclosed that they were void. The question may therefore be raised at any time.

NEITHER DIRECTOR GENERAL NOR STEAMSHIP COMPANY LIABLE ON SHIPMENTS HANDLED BY SHIPPING BOARD.

The answers allege and the evidence discloses that the Shipping Board requisitioned all the Steamship Company's vessels effective October 15, 1917, and operated them from that date to May 29, 1918, both dates inclusive. It is true that the Shipping Board operated through the former officers and employes of the Steamship Company, as did the Director General when he took control of the Steamship Company's vessels on May 30, 1918. It is true, likewise, that the bill of lading forms used were the Steamship Company's forms. In this respect the situation was the same as in the case of operation of all of the railroads during the first few months of federal control. That these facts are not sufficient to charge the corporation with liability is taught by Davis, Director General vs. Zirkle, 138 N. E. (Ind.) 266, decided March 7, 1923.

The vessels were requisitioned under authority of law and the Steamship Company directed to continue to operate them for account of the Government. Therefore, under the authority of Missouri Pacific R. R. Co. vs. Ault, 256 U. S. 554, the Steamship Company is not liable on shipments moving between October 15, 1917, and January 1, 1918, the beginning of federal control, nor is the Director General liable on shipments moving between January 1, 1918, and May 30, 1918.

THE DISTRICT COURT HAD NO JURISDICTION. EXCLUSIVE ORIGINAL JURISDICTION OF THIS CLASS OF CASES WAS LODGED IN THE INTERSTATE COMMERCE COMMISSION BY THE COMMERCE ACT, AND AS TO CLAIMS AGAINST THE DIRECTOR GENERAL BY THE FEDERAL CONTROL ACT AND THE TRANSPORTATION ACT.

The extent of the exclusive original jurisdiction of the Interstate Commerce Commission has been before this court in numerous cases. Before Texas & Pacific Railway Co. vs. Abilene Cotton Oil Co., 204 U. S. 426, the courts seemed to have entertained all classes of cases involving violations of the Commerce Act. In that case, however, it was pointed out that exclusive initial jurisdiction was lodged in the Interstate Commerce Commission in all cases where a scheduled rate is attacked, and that when a rate is once established in a tariff carriers are bound by law to collect it until changed by the Commission.

In Baltimore & Ohio R. R. Co. vs. Pitcairn Coal Co., 215 U. S. 481, it was held that the method or rule of distribution of cars adopted by a carrier can only be attacked before the Commission and that the courts are without jurisdiction of such cases.

In Robinson vs. Baltimore & Ohio R. R. Co., 222 U. S. 506, a rate was attacked as discriminatory. It was held that the courts were without jurisdiction since this involved an attack upon a scheduled rate.

In Mitchell Coal & Coke Co. vs. Pennsylvania R. R. Co., 230 U. S. 247, jurisdiction was denied to the courts of a suit for damages by reason of the payment by a carrier of unreasonable amounts for service performed by some shippers, while refusing to make similar payments to others.

In Morrisdale Coal Co. vs. Pennsylvania R. R. Co., 230 U. S. 304, the courts were again denied jurisdiction of suits for damages based on allegations that the rule of car distribution adopted by a carrier was discriminatory.

In Texas and Pacific Ry. Co. vs. American Tie Co., 234 U. S. 138, jurisdiction was denied the courts of a suit to determine whether rates in a lumber tariff applied to cross ties.

In Northern Pacific Ry Co. vs. Solum, 247 U. S. 477, jurisdiction was denied the courts of a suit for damages against a carrier for routing shipments, in the absence of direction by the shippers, over the more expensive of two possible routes. The following succinct statement of the rule requiring preliminary determination of administrative questions by the Commission was made in that case:

> "It applies, likewise, to any practice of the carrier which gives rise to the application of a rate."

In Director General of Railroads vs. Viscose Co., 254 U. S. 498, jurisdiction was denied to the courts of a suit enjoining the Director General from cancelling a tariff on raw silk and adding that commodity to the articles "that will not be accepted for shipment". The concluding sentence of the opinion is illuminating:

> "The importance to the commerce of the country of the exclusive, initial jurisdiction which Congress has committed to the Interstate Commerce Commission need not be repeated and cannot be overstated (citing numerous decisions), and, concluding, as we do, that this case falls plainly within that jurisdiction, the question asked by the Circuit Court of Appeals must be answered in the negative."

On the other hand, in Pennsylvania R. R. Co. vs. International Coal Co., 230 U. S. 184, jurisdiction of the courts was sustained in a suit for damages based on a carrier's giving rebates from the scheduled rates to a shipper's competitor; in Pennsylvania R. R. Co. vs. Puritan Coal Co., 237 U. S. 121, and Pennsylvania R. R. Co. vs. Sonman Coal Co., 242 U. S. 120, it was held the courts had jurisdiction of suits for damages on account of failure to furnish cars, there being no shortage of cars involved and no attack being made upon the rule of distribution adopted by the carrier; in St. Louis, etc., R. R. Co. vs. Hasty, 255 U. S. 252, this court interpreted a tariff where the matter was so free from doubt that it considered there was no occasion to apply to the Commission for a construction.

The distinction between the two classes of cases is obvious. In the one, scheduled rates or rules adopted by the carrier are attacked on one ground or another; in the other, no attack is made upon the schedules or rules of the carrier, but some departure from them or some matter unconnected with the schedules or rules is involved. In the one the uniformity sought by the Commerce Act necessitates a finding by a competent tribunal for the benefit of all shippers similarly situ-

ated and binding upon them; in the other there is involved merely a controversy which concerns only a carrier and a particular shipper, and the finding of a court does not bind or directly benefit other shippers; in the one examination of the schedules and rules of the carrier by a specially equipped tribunal is necessary to full relief, and in the other the schedules and rules of the carrier are, for the purposes of the litigation, conclusively presumed legal.

Plaintiff recognizes these principles, but asserts that he is not attacking a legally published rate; that a rate to an intermediate point higher than to a more distant point, even though actually published in a tariff, is never legally published. He assumes that the other rates named in the tariff are legally published rates and that the rate to the more distant point automatically becomes the rate to the intermediate point.

But this is in direct contradiction to the provision of Section 4 that the prohibition against charging more for the short haul than the long "shall not be construed as authorizing any common carrier within the terms of this act to charge or receive as great compensation for a shorter as for a longer distance".

Section 6 (Paragraph 7) of the Commerce Act is as follows:

> "No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge

or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

It follows that if the rate to an intermediate point is not the legally published rate there is no legally published rate and the carrier cannot legally transport the commodity, nor the shipper permit it to be transported to the intermediate point. It is no answer to say that the rate to the intermediate point provided by the tariff previously in effect would govern, since the carriers have cancelled that tariff. In addition, the higher rate to the intermediate point might arise from a reduction of the rate to the more distant point, in which case, under plaintiff's theory, the intermediate rate would immediately become illegal and there could be no published rate. Under plaintiff's theory, therefore, the sugar shipped by his assignors was shipped illegally because there were no rates published to cover the movement.

In this situation, the doctrine of Payne vs. Bassett, 235 S. W. 917, that there can be no recovery for damage to commodities transported in interstate commerce when there is no legal published rate to cover the movement, is applicable also to a recovery of all or part of the charges collected. The carrier by transporting and

the shipper by shipping and paying the charges must be held to have made and performed an illegal contract, from the consequences of which the law will not relieve either of them.

But plaintiff's theory, we believe, misinterprets the plain meaning of Section 4. That section is not directed solely against the rate for the short haul, but against relation between the rates to the intermediate point and the more distant point. It is true, the section declares it unlawful to charge more for the short haul than for the long, but the meaning would have been the same had the prohibition been against charging less for the long haul than for the short.

Section 3 of the Act relates to discrimination in general and Section 4 to one form of discrimination. This is demonstrated by the opinion of this court in Parsons vs. C. & N. W. Ry. Co., 167 U. S. 447. That was an action for alleged violation of the long and short haul provision of Section 4 of the Commerce Act. It was decided in 1897 before the amendments which gave force to the Commerce Act and real power to the Commission, and before the decision of Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S. 426, which first announced the doctrine that the courts were without jurisdiction of matters intrusted to the Commission by the Commerce Act. No question of the jurisdiction of the court seems to have been raised. The following observations of the court at page 454 clearly define the nature of Section 4:

> "We remark again that there is no averment in this petition that the rates charged to and paid by the plaintiff were, in themselves, unreasonable; that is, it is not claimed that the rates charged for

shipping corn from points in Iowa to Chicago were not fair and reasonable charges for the services rendered. The burden of the complaint is the partiality and favoritism shown to places and shippers in Nebraska. The plaintiff is not seeking to recover money which inequitably and without full value given has been taken from him. He is only seeking to recover money which he alleges is due, not because of any unreasonable charge, but on account of the wrongful conduct of the defendant."

If Section 4 is a prohibition against one specific type of discrimination, a matter of relativity of rates, then the difference between the rates for the short haul and the long is not the measure of damages. In American Express Co. vs. Caldwell, 244 U. S. 617, a suit involving discrimination between intrastate and interstate rates, this court made the following observations at page 624:

"1. The nature of the Interstate Commerce Commission's order.

"In its specific direction the order merely prohibits charging higher rates to and from Sioux City than to and from the five South Dakota cities. It could be complied with (a) by reducing the interstate rates to the South Dakota scale or (b) by raising the South Dakota rates to the interstate scale or (c) by reducing one and raising the other until equality is reached in an intermediate scale. The report (which is made a part of the order) contains, among other things, a finding that the interstate rate which was prescribed by the Commission was not shown to be unreasonable. This finding gives implied authority to the Express Companies, both to maintain their interstate rates and to raise,

to their level, the intrastate rates involved. The Shreveport case (Houston, East & West Texas Ry. Co. vs. United States), 234 U. S. 342. For, if the interstate rates are maintained, the discrimination can be removed only by raising the intrastate rates.

"But the finding that discrimination exists and that the interstate rates are reasonable does not necessarily imply a finding that the intrastate rates are unreasonable. Both rates may lie within the zone of reasonableness and yet involve unjust discrimination. Interstate Commerce Commission vs. Baltimore & Ohio R. R. Co., 145 U. S. 263, 277. Proceedings to remove unjust discrimination are aimed directly only at the relation of rates. If in such a proceeding an unreasonable rate is uncovered and that rate made reasonable, it is done as a means to the end of removing discrimination. The correction is an incident merely."

In St. Louis etc. Ry. Co. vs. U. S., 245 U. S. at page 144 this further statement is found:

"Furthermore, the order in the case at bar is not merely one to prevent discrimination. Orders to remove discrimination, as commonly framed, do not fix rates. They merely determine the relation of rates, by prohibiting the carrier from charging more for carriage to one locality than under similar conditions to another; and they usually leave the carriers free to remove the discrimination either by raising the lower rate or by lowering the higher rate or by doing both. American Express Co. vs. Caldwell, 244 U. S. 617, 624."

To the same effect is Hillsborough Mills vs. Boston & M. R. Co., 269 Fed. 816.

Section 1 of the Commerce Act forbids unreasonable rates; Section 2, the charging of greater or less compensation to one person than to others; Section 3, undue preference of and discrimination against persons and localities, and Section 4, charging more for a short haul than for a long haul. There are no degrees of unlawfulness created by these sections. It is as unlawful under the Act to charge unreasonable rates or to charge more or less to one person than to others, or prefer or discriminate against a person or locality, as it is to violate the long and short haul clause.

Section 6 requires carriers to publish schedules of their rates, to collect from all shippers the charges named in the schedules and no other. Since rates may be published which are unreasonable or otherwise in violation of one or more of the first four sections of the Act, there is an apparent conflict between Section 6 requiring collection of the published rates and the other sections forbidding the collection of unreasonable, preferential or discriminatory rates, or rates which violate the long and short haul clause.

This conflict has been recognized by this court in several decisions and by the Interstate Commerce Commission in numerous decisions. In Armour Packing Co. vs. U. S., 209 U. S. 56, a rebating case in which an agreement was made between several shippers and carriers for rates lower than those named in the published tariffs, this court clearly stated the binding effect of published rates. We quote from page 80, et seq.:

"It is strongly urged that there is nothing in the acts of Congress regulating interstate commerce which can render illegal the contract between the shipper and the railroad company covering the period from June to December, 1905. The contract, it is insisted, was at the legal, published and filed rate, and there is nothing in the law destroying the right of contract so essential to carrying on business such as the petitioner was engaged in. But this contention loses sight of the central and controlling purpose of the law, which is to require all shippers to be treated alike, and but one rate to be charged for similar carriage of freight, and that the filed and published rate, equally known by and available to every shipper.

In the Elkins Act Congress has made it a penal offense to give or receive transportation at less than the published rate. This rate can only be raised by ten days' or lowered by three days' notice. Sec. 6, 25 Stat. 855. There is no provision excepting special contracts from the operation of the law. One rate is to be charged and that the one fixed and published in the manner pointed out in the statute, and subject to change in the only way open by the statute. There is no provision for the filing of contracts with shippers and no method of making them public defined in the statute. If the rates are subject to secret alteration by special agreement then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart.

It is said that if the carrier saw fit to change the published rate by contract the effect will be to

make the rate available to all other shippers. But the law is not limited to giving equal rates by indirect and uncertain methods. It has provided for the establishing of one rate, to be filed as provided, subject to change as provided, and that rate to be while in force the only legal rate. Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish.

Nor do we find anything in the provisions of the statute inconsistent with this conclusion in the fact that the statute makes the rate as published or filed conclusive on the carrier. The carrier files and publishes the rate. It may well be concluded by its own action. But neither shipper nor carrier may vary from the duly filed and published rate without incurring the penalty of the law."

In P. C. C. & St. L. Ry. vs. Fink, 250 U. S. 577, an action for an undercharge, this court said at page 581:

"The purpose of the act to regulate interstate commerce, frequently declared in the decisions of this court, was to provide one rate for all shipments of like character, and to make the only legal charge for the transportation of goods in interstate commerce the rate duly filed with the Commission. In this way discrimination is avoided, and all receive like treatment, which it is the main purpose of the act to secure."

In Keogh vs. C. & O., 43 Supreme Court Reporter 47, decided November 13, 1922, a suit for damages under the Sherman Anti-trust Act, based on alleged ex-

cessive rates maintained by a carrier, the binding effect of a published rate was restated in the following language:

> "Injury implies violation of a legal right. The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff can not be varied or enlarged by either contract or tort of the carrier."

In Pennsylvania R. R. Co. vs. International Coal Co., 230 U. S. 184, an action for the difference between the published rates paid by a shipper and the lower rates charged his competitor, a case to which we shall later refer on the subject of damages, this court at page 196, et seq., made the following clear statement of the effect of Section 6:

> "The published tariffs made no distinction between contract coal and free coal, but named one rate for all alike. That being true, only that single rate could be charged. When collected, it was unlawful, under any pretense or for any cause, however equitable or liberal, to pay a part back to one shipper or to every shipper. The statute required the carrier to abide absolutely by the tariff. It did not permit the company to decide that it had charged too much and then make a corresponding rebate; nor could it claim that it had charged too little and insist upon a larger sum being paid by the shipper. (February 4, 1887, 24 Stat. 379, c. 104, sec. 2; March 2, 1889, 25 Stat. 855, c. 382, sec. 6. Armour Co. vs. United States, 209 U. S. 56,

83.) The tariff, so long as it was of force, was in this respect to be treated as though it had been a statute, binding as such upon railroad and shipper alike. If, as a fact, the rates were unreasonable, the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation.

In view of this imperative obligation to charge, collect and retain the sum named in the tariff, there was no call for the exercise of the rate-regulating discretion of the administrative body to decide whether the carrier could make a difference in rates between free and contract coal. For whether it could do so or not, the refund of any part of the tariff rate collected was unlawful. It could not have been legalized by any proof, nor could the Commission by any order have made it valid."

The Commission in its decisions holding Section 6 paramount over other sections of the Act, has adopted the term "legal rate" as synonymous with the published rate and the term "lawful rate" as meaning a rate which does not violate any of the other sections of the act.

In Poor Grain Co. vs. C. B. & Q. Ry. Co., 12 I. C. C. 418, we find the following in the opinion of the Commission at page 423:

"The principle, however, is vital in our commercial life that there shall be one fixed and absolutely rigid rate governing the transportation at a given time of any given commodity between two given points, and that it shall be unalterable by any act or omission by the carrier or the particular

shipper, or in any manner other than that provided by law."

And again at page 424 et seq:

"Besides the issues hereinbefore adverted to, reparation is demanded on another ground that lends further emphasis to the question here under consideration of the fixedness and inflexibility of a published rate. A rate may be lawful in the sense that it is the regularly published rate and therefore the only rate under which traffic may lawfully move, and yet at the same time be unlawful in the sense that it is excessive and unreasonable in amount. Its lawfulness as the published rate is to be tested by the mere inspection of the schedules on file with the Commission, and if found to have been published in conformity with the requirements of law that rate must in all cases be charged and actually collected by the carrier even though it may be excessive. Whether or not it is unlawful in the sense of being excessive depends upon all the circumstances and conditions that are recognized as having a legitimate influence in rate making. But in no event may a carrier agree with a shipper that the published rate, under which shipments have been made, is too high and undertake to adjust it by collecting a less rate. *The publication fixes and makes the rate inflexible and unalterable,* as heretofore explained, *and that rate must be applied until changed in the manner required by law.* Nor may a carrier, when a rate has been duly canceled and a lower rate made effective, voluntarily refund from the freight charges already collected, and thus give the benefit of the new rate on shipments

that moved under the previous higher rate. This Commission alone has jurisdiction to authorize a refund to be made from the charges collected on previous shipments. And it can give such authority only upon an affirmative finding that such rate was excessive and unreasonable, and therefore unlawful. The complainant appeals to that jurisdiction in this petition. (Italics ours.)

In Interstate Remedy Company vs. American Express Co., 16 I. C. C. 436, the Commission restated the proposition thus at page 4:

"But even if it should eventually be held that a carrier may not lawfully make a lower rate upon a return shipment than would apply if it were an original shipment, we are of opinion that *the carrier may not plead the unlawfulness of its tariff to avoid extending the benefit thereof to a shipper.* While it has been repeatedly emphasized by the Commission that the shipper is put upon notice of a rate by the publication of the tariff, *it has not been held that a shipper must determine for himself the lawfulness of a rate, regulation, or practice, upon his peril.* The responsibility rests upon the carrier to have lawful rates and rules in effect, and *every shipper may with safety rely upon such rates without fear that they will be withdrawn as illegal after he has made shipment thereon, resting in the confidence that they are lawful so long as they are in force.* If subsequently found to be unlawful, the carrier is subject to penalty for the institution and maintenance of such rates or rules, but *the law does not contemplate that the shipper shall move upon any other theory than that the provisions of the*

carrier's tariff are in full compliance with the law's demands." (Italics ours.)

In Crescent Coal & Mining Co. vs. C. & E. I. R. R. Co., 24 I. C. C. 149, the effect of Section 6 is again stated. We quote at page 156:

> "The sole question to be determined is the identity and amount of the lawfully applicable tariff rate in effect at the time these shipments moved, and in so doing we must not confuse the *lawfulness* of the rate under other sections of the act with its *legality* under section 6. *For example, a rate unreasonably high and unlawful in the sense of Section 1 may, nevertheless, be the legally established standard and rule of action under Section 6. The sole test of the latter is the due publication of the rate in the manner and form prescribed by the statute.* This is true of all interstate rates, at least so far as the shipping public generally is concerned, regardless of how the rate may have come to be established, whether knowingly in the usual course or inadvertently or for collusive or other improper purposes. * * * In so finding we do not mean to be understood as sanctioning the action of the carriers in establishing joint rates, divisions, or allowances, in the form of switching charges or otherwise, between the Depue & Northern Railroad and its connections. Should further investigation disclose collusive or unlawful relations between the Depue & Northern (or the Mineral Point Zinc Company) and its trunk-line connections in the establishment of such rates or allowances, these matters may be dealt with under appropriate provisions of the act; *and even should it appear that*

this proportional rate was established for improper purposes, it is nevertheless the legal standard of charges for the shipping public until withdrawn under condemnation by the Commission or by voluntary action of the carriers. The point is that regardless of the nature or motive, whether lawful or unlawful, of the negotiations, of whatever character, preceding its establishment, a rate is not affected in its character as the standard rule of action and public rate under section 6 so long as it remains in effect in the manner prescribed in the act and by our tariff regulations. In a proper proceeding its unlawfulness under other sections and the injustice resulting from its enforcement may be corrected by suitable order at the time the Commission is called upon to pass upon its reasonableness and justness.

* * * * * * *

This application of the statute to these facts is not a technical one, but is imperative, not only because in conformity with the strict letter of the law but with the only construction which will preserve the chief function of section 6, which, as declared by the Supreme Court, is to accord and require the application of the same rate to all shippers and to promote equality of treatment between them." (Italics ours.)

These authorities demonstrate that it was the duty of the carriers in the instant cases to collect the published charges, even though such charges were violative of Section 4, a question later to be discussed; that if there was a violation of the Fourth Section it was a

form of discrimination which the carriers could remove voluntarily by lowering the short haul rate, raising the long haul rate, or by changing both rates in such manner as to correct the violation; or, on the other hand, the Commission might order the carriers to remove the violation by resorting to any one of these three expedients; that the Fourth Section specifically provides that it shall not be interpreted as authorizing the charging of as much for a short haul as for a long; that courts are powerless to fix rates, this being an administrative function committed to the Commission, and that the only way in which the rate to be charged to an intermediate point can be determined, in the absence of voluntary action by the carriers, is through the Commission.

So we find the decisions of the Interstate Commerce Commission full of cases involving violations of Section 4 of the Act, and such cases absent from the court reports until the decision of the Circuit Court of Appeals in this case resulted in the filing of a large number of similar cases in the courts. The Commission has consistently held that the mere fact of a Fourth Section violation does not give a shipper who pays the intermediate rate, a right of action for the difference between that rate and the rate to the more distant point, and that there may be no damage, or the damage may be more or less than the difference in rates. These decisions of the Commission are so numerous that regard for the length of this brief forbids listing them all. Several such cases are found in almost every recent volume of the Interstate Commerce reports.

A typical case is Iten Biscuit Co. vs. C. B. & Q. R. R. Co., 53 I. C. C. 729. The following quoted from the opinion at page 731 et seq. is illustrative:

> "With respect to the Fourth Section departures complainant insists that, regardless of the reasonableness of the rates from and to the more distant points, the rule of the Fourth Section is absolute, the collection of higher charges from and to Omaha was unlawful per se, and the excessive charges must as a matter of law be refunded."

The opinion then discusses the cases of Pennsylvania R. R. Co. vs. International Coal Co., 230 U. S. 184, and So. P. Co. vs. Darnell-Taenzer Co., 245 U. S. 531, and then goes on as follows:

> "But where the unlawful act was the charging of a higher rate for a shorter than for a longer haul, in violation of the provisions of the fourth section of the act, it does not follow that the higher rate was unreasonable or more than should justly have been required for the service performed. As we find was the fact in the present instance, the higher rate may have been reasonable per se and the lower rate too low. In such a case the violation should have been eliminated by raising the lower rate, and a complainant who paid the higher rate to or from the intermediate point would clearly not be entitled to reparation unless he could prove that the charging of the lower rate to or from the more distant point subjected him to prejudice and to consequent damage. In this instance, as we have already seen, there is no such proof."

This construction of the Fourth Section was adopted by the Commission as early as 1908 as is evidenced by Topeka Banana Dealers' Association vs. St. L. etc. R. Co., 13 I. C. C. 620, 627, decided in that year, and has been reannounced so frequently by the Commission that it should be followed by the courts unless manifestly incorrect. Heath vs. Wallace, 138 U. S. 573; U. S. vs. Cerecedo, 209 U. S. 337.

In addition to these reasons for holding exclusive initial jurisdiction to be in the Commission, we have here involved administrative questions which are clearly outside the jurisdiction of the courts. An inspection of the map attached to the fly leaf of this brief will disclose that geographically North Portland is nearer San Francisco by water than Portland; that shipments carried from San Francisco to Portland, and thence to North Portland, follow a route which substantially doubles back upon itself. In addition the Steamship Company's vessels before reaching Ainsworth Dock in the heart of the City of Portland, the regular landing place of the vessels, pass Terminal No. 4 at the boundary of the City. At this point connection may be had with the rail lines of Oregon-Washington Railroad & Navigation Company, and commodities transported to North Portland without going through the center of the City. The distance to North Portland via this route is substantially the same as the distance to Ainsworth Dock. As a matter of operating convenience the Steamship Company's vessels do not touch at North Portland or Terminal No. 4 on their way to Portland, but there is no physical reason why they should not do so, and it is within the power of the Commission to compel them to do so. The evidence discloses that no shipments

have ever been made on the Steamship Company's vessels to North Portland, which may account for the failure of the vessels to touch at that point. If shipments were actually offered to the Steamship Company for transportation to North Portland it would be a question for the Commission to determine whether the failure to touch at North Portland or Terminal No. 4 was a reasonable practice.

An apt illustration of a route which doubles back upon itself is found on the rail lines of Oregon-Washington Railroad & Navigation Company shown on the map. It will be observed that there are two lines running from Troutdale to Portland. The southerly line is more direct. The northerly line circles the northern and western limits of the City. Fairview is a station on the southerly line a short distance west of Troutdale. In practice the southerly line is used as a passenger line and the northerly lines as a freight line. Shipments of freight destined to points on the southerly line between Troutdale and Portland are in practice routed via the northerly line into the City, and thence switched easterly on the southerly line to point of destination, as, for instance, Fairview. This, of course, is merely a matter of company convenience. Nevertheless, by the route which such freight actually travels, Portland is intermediate to Fairview. Can a court ignore geography and hold that Portland is intermediate to Fairview merely because the carrier's tariffs may provide that freight destined to Fairview shall move via Portland? Clearly not. An administrative question would obviously be there involved as to whether such a route was a reasonable route.

The illustration used is not an imaginative supposition. This identical situation with Spokane, Washington, substituted for Portland, and Dishman, Washington, for Fairview, is now the subject of litigation in the District Court of the United States for Oregon.

There are additional reasons for holding the claims against the Director General to be within the exclusive jurisdiction of the Commission. Section 10 of the Federal Control Act, 40 Stat. L. 451, reads in part as follows:

> "Section 10. That carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other act applicable to such federal control or with any order of the President. * * *
>
> That during the period of federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the Commission pending final determination.
>
> Said rates, fares, charges, classifications, regulations, and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President

as establishes or changes any rate, fare, charge, classification, regulation, or practice of any carrier under federal control, and may consider all the facts and circumstances existing at the time of making the same. In determining any question concerning any such rates, fares, charges, classifications, regulations, or practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and coordinated national control and not in competition.

After full hearing the Commission may make such findings and orders as are authorized by the Act to regulate commerce as amended, and said findings and orders shall be enforced as provided in said Act: *Provided, however,* That when the President shall find and certify to the Interstate Commerce Commission that in order to defray the expenses of federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, the Interstate Commerce Commission in determining the justness and reasonableness of any rate, fare, charge, classification, regulation, or practice shall take into consideration said findings and certificate by the President, together with such recommendations as he may make."

It will be noted from the foregoing that the Director General, the agent of the President, was not made un-

qualifiedly subject to all laws, state and federal, but only in so far as those laws were not inconsistent with the Federal Control Act and any order of the President. It appears from the complaints that the President continued for the first few months of federal control the rates which he found in the tariffs of the carriers, and that on June 25, 1918, by General Order No. 28, the Director General of Railroads increased these rates, along with other rates throughout the United States, by twenty-five per cent (25%). These obviously were orders of the President and in so far as existing laws either state or federal, were inconsistent with those orders, they were of no effect.

Northern Pacific Ry. Co. vs. North Dakota, 250 U. S. 135, arose from the allowance by a state court of a peremptory writ of mandamus commanding the Director General of Railroads to desist from charging for transportation in intrastate business in North Dakota the rates fixed by the Director General, and to collect only the lesser rates fixed in the tariffs on file with the Public Utilities Commission of the State. Under the laws of North Dakota such rates could not be changed without the approval of the Utilities Commission. This court reversed the Supreme Court of North Dakota, and explained the effect of Section 10 as follows:

> At page 143. "By the proclamation a Director General of Railroads was appointed with full authority to take possession and control of the systems embraced by the proclamation and to operate and administer the same. To this end the Director General was given authority to avail himself of the services of the existing railroad officials, boards of directors, receivers, employees, etc., who were au-

thorized to continue to perform their duties in accordance with their previous authority 'until and except so far as said Director shall from time to time by general or special orders otherwise provide.' Limited by the same qualification the systems of transportation taken over by the Government were made subject to existing statutes and orders of the Interstate Commerce Commission and to all statutes and orders of regulating commissions of the various states in which said systems or any part thereof might be located. In addition, however, to the limitation previously stated the proclamation in express terms declared: 'But any orders, general or special, hereafter made by said Director, shall have paramount authority and be obeyed as such.' "

And at page 148:

"No elaboration could make clearer than do the Act of Congress of 1916, the proclamation of the President exerting the powers given, and the Act of 1918 dealing with the situation created by the exercise of such authority, that no divided but a complete possession and control were given the United States for all purposes as to the railroads in question. But if it be conceded that despite the absolute clarity of the provisions concerning the control given the United States, and the all-embracing scope of that control, there is room for some doubt, the consideration of the general context completely dispels hesitancy. How can any other conclusion be reached if consideration be given the comprehensive provisions concerning the administration by the United States of the prop-

erty which it was authorized to take, the financial obligations under which it came and all the other duties and exactions which the act imposed, contemplating one control, one administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority to replace for the period provided the private ownership theretofore existing? This being true, it must follow that there is no basis for the contention that the power to make rates and enforce them which was plainly essential to the authority given was not included in it.

Conclusive as are these inferences, they are superfluous, since the portion of Section 10 as previously reproduced in the margin in express terms confers the complete and undivided power to fix rates. The provision is this: 'That during the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the commission pending final determination.' These quoted words are immediately followed by provisions further defining the power of the Commission and its duty in the premises, so as to enable it beyond doubt to consider the situation resulting from the act and to which the rates were to be applied. The unison between that which is inferable and that which is expressed demonstrates the true significance of the statute."

In Missouri Pacific vs. Ault, 256 U. S. 554, the court held inapplicable to the Director General a statute of a state providing a penalty for the failure by a railroad Company to pay promptly the wages of discharged employes.

In Alabama & Vicksburg Ry. Co. vs. Journey, 42 Supreme Court Reporter 6, decided by this court November 7, 1921, General Order No. 18, issued by the Director General, prescribing the venue of suits, was upheld as against the statutes of Mississippi on the same subject, attention being called to the fact that Section 10 of the Federal Control Act "permitted enforcement of liabilities against carriers while under federal control only 'in so far as not inconsistent * * * with any order of the President.' "

The provision of Section 10 limiting the application of statutes to cases in which the statutes are not "inconsistent with any order of the President" refers specifically to federal laws as well as state laws and the common law. It subjects to this limitation Section 4 of the Interstate Commerce Act, and, indeed, the whole Interstate Commerce Act, except as the limitation is itself limited by the provisions in the last two paragraphs of Section 10, giving the Interstate Commerce Commission power to inquire into the justness and reasonableness of orders fixing rates, classifications, regulations and practices, and after full hearing to make such findings and orders as are authorized by the Commerce Act. It follows, therefore, that the rates maintained by the Director General were not subject to attack and are not now, except before the Interstate Commerce Commission.

At the termination of Federal control many claims were pending. The Transportation Act terminated federal control and necessarily with it went the provisions relating to suits against the Director General. Therefore, a new consent to be sued was given by Section 206 (a)-(g) of the Transportation Act. Section 206 (a) is a general section giving the right to bring actions, suits and proceedings in admiralty against an agent designated by the President in any court, which, but for federal control, would have had jurisdiction of the cause of action had it arisen against a carrier.

Paragraph (b) relates to service of process. Paragraph (c) is as follows:

> "Complaints praying for reparation on account of damage claimed to have been caused by reason of the collection or enforcement by or through the President during the period of Federal control of rates, fares, charges, classifications, regulations, or practices (including those applicable to interstate, foreign, or intrastate traffic) which were unjust, unreasonable, unjustly discriminatory, or unduly or unreasonablly prejudicial, or otherwise in violation of the Interstate Commerce Act, may be filed with the Commission, within one year after the termination of Federal control, against the agent designated by the President under sub-division (a), naming in the petition the railroad or system of transportation against which such complaint would have been brought if such railroad or system had not been under Federal control at the time the matter complained of took place. The Commission is hereby given jurisdiction to hear and decide such complants in the manner provided in

the Interstate Commerce Act, and all notices and orders in such proceedings shall be served upon the agent designated by the President under subdivision (a)."

Paragraph (e) provides that final judgments, decrees and awards shall be paid out of a revolving fund created by other sections of the Act.

By an Act approved February 24, 1922 (42 Stat. L. 393), Paragraph (a) was amended by adding a limitation of one year after the date of the Commission's award for the filing of actions to enforce such awards. The same Act amended Section (c) by extending the time within which claims for over charges above the legal tariff charge could be filed with the Commission, to two years and six months.

Section 206 (a) is a general consent to be sued and is, of course, necessarily comprehensive in its terms. Section 206 (c) is, however, equally comprehensive in its own field. It covers every question which could arise out of the Interstate Commerce Act, and affords a complete remedy for any and all violations of that Act. Therefore, under elementary rules of statutory construction the particular part of the field covered by Section 206 (c) is taken out of the operation of Section 206 (a).

25 R. C. L. 1010:

"250. General and Particular Provisions.—It is an old and familiar rule, which is closely related to the doctrine of ejusden generis, and to the rule that where an act contains special provisions they must be read as exceptions to a general provision in a separate earlier or subsequent act, that where

there is in the same statute a particular enactment, and also a general one which in its most comprehensive sense would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment."

Furthermore, the actions and suits authorized by Section 206 (a) might be brought within the varying periods of limitations found in state statutes, subject to a maximum limitation of two years from the termination of federal control, whereas, a uniform limitation of one year, except as to undercharges was placed by Section 206 (c) on proceedings before the Commission. This court in Phillips vs. Grand Trunk Ry., 236 U. S. 662, has held uniformity one of the principal objects of the Commerce Act, and that the requirement of the act that all shippers be treated alike necessitates a ruling that they are bound by the same statutes of limitation whether they bring their cases before the Commission or the courts. The same doctrine was reaffirmed in Kansas City Sou. R. Co. vs. Wolf, 43 Supreme Court Reporter, 259. If, under the Transportation Act, a shipper may elect to bring an action for a violation of the Fourth Section in a court or before the Commission, the period of limitation applicable to his cause of action depends upon the forum which he chooses and uniformity is gone.

IF SECTION 4 APPLIES TO SHIPMENTS WHOLLY BY WATER, WAS IT VIOLATED?

In discussing this question the shipments involved should be divided into three classes, those moving prior to Federal control, those moving during Federal control and those moving after Federal control.

As to those in the first class, there was no violation of Section 4 as between the Portland rates and the North Portland rates, because geographically North Portland is nearer by water to San Francisco than Portland, and if any traffic were offered for North Portland it would only be a matter of carrier convenience whether its vessels should touch at North Portland on the way to Portland, or deliver the shipments to the rail carrier at Terminal No. 4, thus in the one case making North Portland intermediate and in the other making it on a different route and one no longer than that to Portland. The location of Portland as the terminus of two of a carrier's rail lines from Troutdale with Fairview located on the passenger line, aptly illustrates the point which we are making with reference to Portland and North Portland. This argument of course does not apply to Astoria, to which a few of the shipments made by plaintiff's assignors were consigned, since Astoria is geographically intermediate on the water route.

But in the case of Astoria as well as Portland, Section 4 was not violated because the carriers did not in fact charge more on shipments to Astoria and Portland than on shipments to North Portland, for the very good reason that there were no such shipments to North Port-

land. A rate on sugar to North Portland was carried in the joint water and rail tariff, but no sugar was ever transported to North Portland, either by the Steamship Company alone or in combination with any rail carrier.

Section 4 provides that "it shall be unlawful for any common carrier * * * to *charge* or *receive* any greater compensation in the aggregate *for the transportation* * * *, of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance." The words "charge" or "receive" "for the transportation" carry with them the implication that actual shipments shall be involved. No cause of action is given to anyone merely because unlawful rates are carried in a tariff. To give ground for complaint, a charge must have been made and collected on an actual shipment to the intermediate point.

Of course, the words "charge or receive for transportation" can have no different meaning in respect of shipments to the more distant point than as to those to the intermediate point. A carrier can not "receive" more for the short haul than the long, without actually collecting charges for both. Likewise, if it has not "charged" for the short haul until an actual shipment has moved and payment of the rate been made or at least demanded, it can not "charge more" for a short haul than for a long haul until it has collected or demanded charges for actual shipments to both places involved. Again, the inhibition of the Section is against charging or receiving *"for the transportation* * * * of like kind of property for a shorter than for a longer distance." There was no transportation to the more

distant point and therefore there was neither charging nor receiving for it.

This interpretation of the Section has the support of Parsons vs. C. & N. W. Ry. Co., 167 U. S. 447—a Fourth Section case to which we have previously referred, wherein it is stated at page 454 that "the burden of the complaint is the partiality and favoritism shown to places and shippers in Nebraska. * * * So, but for the provisions of the Interstate Commerce Act, the plaintiff could not recover on account of his shipments to Chicago, if only a reasonable rate was charged therefor, no matter though it appeared that through any misconduct or partiality on the part of the railway officials, shippers in Nebraska had been given a lesser rate. * * *"

"It was, among other reasons, in order to avoid the public injury which had sprung from such conduct on the part of the railway officials that the Interstate Commerce Act was passed, and violations of its provisions were subjected to penalties of one kind or another."

Judson, on Interstate Commerce, 3rd Edition, p. 529, in discussing Section 8 of the Act, states: "A discriminating rate must be actually charged to make an offense or cause of action under the Act. Merely making or offering an illegal rate when it is not shown that an actual shipment was made, constitutes no legal injury to a shipper who was charged a higher rate. Lehigh Valley R. Co. vs. Rainey, 112 Fed. 487; E. Dist. of Penn. (1902)."

The Commission has given the Section a similar interpretation. In Topeka Banana Dealers' Association vs. St. L. S. F. R. R. Co., 13 I. C. C. 620, 627, a Fourth Section case, the Commission held, "The complaint here is that bananas moved from New Orleans

through Kansas City to Burlington, Iowa, and that the Kansas City rate is higher than that to Burlington. There is a joint rate quoted in the tariffs to Burlington via Kansas City, but no bananas seem to have ever moved over that route. It is nothing more than a paper rate, bananas destined for Burlington moving through St. Louis."

In Anaconda Copper Mining Co. vs. Director General, 64 I. C. C. 136, 139, the Commission said: "Prior to August 31, 1920, the rates to Rome were not in accordance with the long-and-short-haul provision of the Fourth Section. The rate to Utica was neither charged nor collected and complainant made no attempt to prove damage by reason of the collection of higher rates to Rome. Following Iten Biscuit Company vs. C. B. & Q. R. R. Co., 50 I. C. C. 724; 53 I. C. C. 729, no award of reparation can be made."

In Lehigh Valley R. Co. vs. Rainey, 112 Fed. 487, the District Judge of the Eastern District of Pennsylvania, referred to the effect of paper rates in the following language:

> "For present purposes it must be assumed that the rate complained of was discriminating, but I still think that a mere paper rate, which is never carried into effect, and is therefore simply a proposition to carry for a specified sum, is not such a violation of the interstate commerce act as to prevent the carrier from recovering freight from other than the theoretically favored shippers. It is discrimination in fact, and not a mere intention to discriminate, that is punishable; and in the case before the court there was no evidence that a pound of coal had been carried to be sold in the market

by any other shipper than the defendants. Hence no rival of the defendants was benefited by the unaccepted rate, and no harm was done to their business."

There is also the question whether transportation to Portland and Astoria wholly by water, and transportation to North Portland partly by water and partly by rail, could be considered as transportation "over the same line or route." The line or route to Portland and Astoria was named in a local tariff and the line or route to North Portland in a joint water and rail tariff.

In Chicago & N. W. R. Co. vs. Osborne, 52 Fed. 912, Mr. Justice Brewer held that two companies by making a joint tariff established a new line independent of the local line of either, and that a joint rate to a more distant point might be lower than the local rate of one of the carriers to an intermediate point without violating Section 4. This principle was followed in U. S. vs. Mellen, 53 Fed. 229; I. C. C. vs. Cincinnati etc. R. Co., 56 Fed. 925, 936, affirmed 162 U. S. 184; Allen & Lewis vs. O. R. & N. Co., 98 Fed. 16, and was finally made absolute by Parsons vs. C. & N. W. Ry., 167 U. S. 447, 455, decided in 1896.

At the time these decisions were announced the Fourth Section forbade a higher charge for a short haul than for a long haul "over the same line." Subsequently the words "or route" were added after the word "line." The effect of this amendment has not, to our knowledge, been stated by this court. It does not, in our judgment, detract from the force of the decisions quoted. The act now forbids charging more for a short haul than for a long over the same line, thus forbidding that relationship between local rates and likewise forbids the charg-

ing of more for a short haul than a long over the same route, thus forbidding that relationship between joint rates, but still does not prohibit that relationship between joint rates and local rates.

During Federal control rates initiated and maintained by the Director General were under "Order of the President." All statutes, State or Federal, insofar as inconsistent with such orders, were, by Section 10 of the Federal Control Act, made inapplicable. Section 4 of the Commerce Act, like any other statute, was therefore not effective as against the Director General's rates. We have previously quoted from Northern Pacific vs. North Dakota, 250 U. S. 135; Missouri Pacific vs. Ault, 256 U. S. 554, and Alabama etc. Ry. vs. Journey, 42 S. C. A., 6, to that effect. It follows there was no violation of Section 4 during Federal control.

But, in fact, the Commission's Fourth Section Order 7316, dated May 27, 1918, granted authority to the Director General to charge more for the short haul than for the long, whenever General Order No. 28 was in conflict with the Fourth Section. The *second* and *third* paragraphs of *this order* are as follows:

> "And whereas the said Director General has requested such relief from the long-and-short-haul and aggregate-of-the-intermediates provisions of Section 4 of the act to regulate commerce as will permit said carriers under Federal control to file schedules containing rates, fares, charges, or classifications containing departures from aforesaid provisions of Section 4, enabling carriers under Federal control, in the present emergency, to secure increased revenues to be derived from increases in rates, fares, charges, and classifications initiated

and prescribed by said General Order No. 28 of May 25, 1918:

It is Ordered: That in those instances in which carriers under Federal control are required by General Order No. 28 of the Director General, United States Railroad Administration, to apply to the movement of traffic locally or jointly, or jointly with carriers not under Federal control, higher rates, fares, charges, and classifications for shorter than for longer distances over the same line or route in the same direction, the shorter being included within the longer distance, or rates, fares, charges and classifications which exceed the aggregate of the intermediate rates, fares, and charges, and classifications, as set forth in General Order No. 28 of the Director General the said carriers be, and they are hereby authorized to establish such rates, fares, charges and classifications prescribed in said General Order No. 28 of the Director General without observing the provisions of the fourth section of the act to regulate commerce."

That this was intended to apply to Fourth Section departures previously existing, is evidenced by the Commission's Fourth Section Order 7601 of March 1, 1920, which reads in part as follows:

"The question of the relief granted by Fourth Section Order 7316, General No. 17, being under consideration; and

It appearing that the relief granted by the said order applied to all rates, fares, charges and classifications increased in pursuance of General Order No. 28 of the Director General of Railroads, including those which theretofore conformed to the

provisions of the Fourth Section and those not in accord therewith not authorized by orders of this Commission or protected by appropriate Fourth Section application for relief."

The rates charged after Federal control were not in violation of the Fourth Section for a still further reason not applicable to prior shipments. When the roads were returned to their owners, Section 209 of the Transportation Act guaranteed that, for the period of six months from the termination of Federal control, their income should be not less than half the amount named as annual compensation in their contracts with the Government.

Section 208-a continued existing rates in effect and forbade the carriers during the six months period to reduce them. The language of this Section follows:

> "Sec. 208 (a) All rates, fares, and charges, and all classifications, regulations, and practices, in any wise changing, affecting, or determining, any part or the aggregate of rates, fares, or charges, or the value of the service rendered, which on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by State or Federal authority, respectively, or pursuant to authority of law; but prior to September 1, 1920, no such rate, fare, or charge shall be reduced, and no such classification, regulation, or practice shall be changed in such manner as to reduce any such rate, fare, or charge unless such reduction or change is approved by the Commission."

The contention of the plaintiff is that this Section refers only to rates legaly in effect and that the rates to

Portland were not legally in effect. We have endeavored to show that the rates named in the Director General's tariff were legally in effect, but even if we assume they were not, they were actually in effect; that is, they were being collected. Section 208 (a) does not differentiate between rates legally in effect and those illegally in effect, but commands the carriers not to reduce the rates which it finds. It is unthinkable that the carrier during the six months' guaranty period could not transport sugar to Portland at all, but the rates named in the tariff were continued in force or there were no rates at all, and the prohibition of Section 6 against transporting commodities for which no tariff rates had been published applied. It is also an unreasonable and harsh construction of this paragraph which would require carriers to determine at their peril whether the rates they found in the Director General's tariffs were "legally" in effect.

Our researches have disclosed any decision by this Court interpreting Section 208 (a). The Supreme Court of Utah, however, has passed on the question of the effect of this Section upon the long and short haul provision of the Utah statutes, and has held that the Section suspended the operation of the Utah statute during the guaranty period. Wasatch Coal Co. vs. Baldwin, 208 Pacific (Utah) 1109. To the same effect is Public Service Commission vs. New York Central R. R. Co., 185 N. Y. S., 268.

Obviously Section 208 (a) was intended to continue some rates in effect. Unless it continued in effect the rates named in the Director General's tariffs at the termination of Federal control, there were no rates to be continued in force. This in itself demonstrates the fallacy of plaintiff's contention.

THE MEASURE OF DAMAGES IS NOT THE DIFFERENCE BETWEEN THE RATES. NO OTHER EVIDENCE OF DAMAGE WAS OFFERED SO THERE CAN BE NO RECOVERY.

On the subject of damages plaintiff offered no evidence other than the fact that his assignors had paid the published charges to Portland and Astoria on the shipments of sugar listed in his complaints. His theory is that the excess of the Portland and Astoria rates over the North Portland rate constitutes an overcharge above the legally published rate, and that, having established the fact that his assignors paid the excess he is entitled to recover it without other proof of damage.

This contention is refuted by Parsons vs. C. & N. W. R. R. Co., 167 U. S. 447, Pennsylvania R. R. Co. vs. International Coal Co., 230 U. S. 184, several federal decisions, and a long list of decisions by the Interstate Commerce Commission.

In Parsons vs. C. & N. W. R. R. Co., 167 U. S. 447, a Fourth Section case, this Court pointed out that the mere difference in rates is not evidence of damage. We quote at page 459:

> "But these 'might be's' interfere very materially with the line of sequence. He does not show that he had not already contracts with some consignee in Chicago, New Orleans or some place other than the four eastern points named in the tariff, for shipment to him of all grain at his command. He does not allege that he had or would have made

any arrangement with any consignee in any of those points for the receipt and sale of his corn, or even that the extra commissions there would not more than make the difference in rates. In short, he does not allege either directly or indirectly, that if he had known of these rates he would have shipped his corn, under this tariff, to either of those points, but rests his contention upon the suggestion that the mere difference in the prices would naturally have caused him to ship to one or the other of them, and thus to take advantage of the joint tariff. Every fact which he alleges might be absolutely and fully true, and yet he, with the knowledge of the joint tariff, with the privilege of shipping under it, have never offered or sought to forward a single pound of corn to any other place than Chicago. Surely it needs but the statement of this to show that he comes far short of that rule of strict proof which enables one to enforce a penalty for wrong; for, if he would not under any circumstances have shipped to New York, was compelled by his contracts or any other consideration to ship to Chicago, he cannot say that he was injured by his ignorance of the rate to New York. The only right of recovery given by the interstate commerce act to the individual is to the 'person or persons injured thereby for the full amount of damages sustained in consequence of any of the violations of the provisions of this act'. So, before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury. If he had shipped to New York and had been charged local rates he might have recovered any excess

thereon over through rates. He did not ship to New York and yet seeks to recover the extra sum he might have been charged if he had shipped. Penalties are not recoverable on mere possibilities."

In Pennsylvania R. R. Co. vs. International Coal Co., 230 U. S. 184, there was before the court an action for damages for the difference between the rates paid by the plaintiff and lower rates resulting from rebates allowed to plaintiff's competitors. There was no allegation or proof that plaintiff had been damaged except that he paid higher rates than his competitors. This court at page 198 stated plaintiff's contention and commented on it as follows:

"It contends, however, that this was not necessary for the reason that, as matter of law, it was entitled to recover as damages the same rate per ton on all plaintiff's shipments as had been rebated any other person, on any of his tonnage, shipped at the same time over the same route. And such a right of action was expressly given in Section 2 of the original Bill to Regulate Commerce, which, as it passed the Senate May 12, 1886, did provide that the carrier 'shall be liable to all persons who have been charged a higher rate than was charged any other person or persons for the difference between such higher rate and the lowest rate charged upon like shipments during the same period; or if such lower rate was made on any time contract or understanding, the said common carrier shall be liable to pay a like rebate or drawback to all other shippers over the same route between the same points who have shipped goods during the time that such contract or understanding was in operation.'

The fact that this provision measuring the amount of recovery by rebate was omitted from the Act, as finally reported to both Houses and passed, is not only significant, but so conclusive against the contention of the plaintiff that it quotes —not the report of the conference committee—but a statement, made by a member of the Senate Conference Committee, to support the present argument that Section 8 means the same thing as the omitted clause. But while they may be looked at to explain doubtful expressions, not even formal reports—much less the language of a member of a Committee—can be resorted to for the purpose of construing a statute contrary to its plain terms, or to make identical that which is radically different. *United States v. Freight Association,* 166 U. S. 290, 318; *Maxwell v. Dow,* 176 U. S. 581, 601. Section 2 of the original Senate Bill said nothing about *damages* but in the case of rebating gave a shipper a right, in the nature of an action, for a penalty to be measured by the difference between the lawful and the unlawful rate, whether damage resulted or not. That provision was stricken out and Section 8 of the Act, as passed by both Houses of Congress and approved by the President, gave a right of action for *damages* and attorneys' fees to 'the person injured'—and, of course, to the extent of the injury."

Again at page 202:

"For if the plaintiff here had been required to pay more than the tariff rate it could have recovered the excess, not as damages but as overcharges, and while one count of the complaint asserted a

claim of this nature, the proof did not justify a verdict thereon, for the plaintiff admitted that it had only paid the lawful rates named in the tariff. Of course, no part of such payment of lawful rates can be treated as an overcharge or as an extortion.

Having paid only the lawful rate plaintiff was not overcharged, though the favored shipper was illegally undercharged. For that violation of law, the carrier was subject to the payment of a fine to the Government and, in addition, was liable for all damages it thereby occasioned the plaintiff or any other shipper. But under Section 8, it was only liable for damages. Making an illegal undercharge to one shipper did not license the carrier to make a similar undercharge to other shippers, and if having paid a rebate of 25 cents a ton to one customer, the carrier in order to escape this suit had made a similar undercharge or rebate to the plaintiff, it would have been criminally liable, even though it may have been done in order to equalize the two companies. For, under the statute, it was not liable to the plaintiff for the amount of the rebate paid on contract coal, but only for the damages such illegal payment caused the plaintiff. The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved they could not be recovered. Whatever they were they could be recovered, because Section 8 expressly declares that wherever the carrier did an act prohibited or failed to do any act required, it should be *'liable to the person injured thereby*

*for the full amount of damages sustained in consequence of such violation, * * * together with reasonable attorney's fee.'* In view of this language it becomes necessary to inquire what the evidence shows was the injury inflicted or the damage sustained by the plaintiff in 1901 in consequence of paying rebates in 1901 on contract coal sold in 1899."

In Hillsborough Mills vs. Boston & M. R. Co., 269 Fed. 816, (District Court of Mass.) plaintiff, after securing a finding by the Commission that the absorption of certain switching charges to certain docks used by plaintiff's competitors without a corresponding absorption of charges for switching to the dock used by plaintiff, was discriminatory, brought suit for the excess of the rates he had to pay over those paid by his competitors. After a review of the decisions of this court on the subject, the court held:

"The plaintiff paid no more than it was legally obliged to pay. There may have been disadvantages in using the Commonwealth Dock which more than offset the saving in transportation charges from it. Everything considered, it may have been as profitable to import over the National Dock and pay the switching charges, as over the Commonwealth Pier and not pay them. If so, the plaintiff's competitors, who used the Commonwealth Pier, gained no advantage by so doing, and the plaintiff sustained no damage because of the unlawful rate accorded them."

To the same effect are Homestead Coal Co. vs. Des Moines Electric Co., 226 Fed. 49; Atchison, etc., R.

Co. vs. Spiller, 246 Fed. 1, 20; Clark Bros. Coal Mining Co. vs. Penn. R. R. Co., 238 Fed. 642, and Lehigh Valley R. Co. vs. American Hay Co., 219 Fed. 539.

Substantially all cases involving Section 4, which preceeed the cases at bar, were brought before the Commission. It would be a task of no small magnitude to assemble all of the cases of the Commission holding that in such cases evidence of the difference in rates is no proof of damage. We have already referred to a few of them and will refrain from citing more because plaintiff will concede that to be the long established ruling of the Commission.

ALL CLAIMS ANTEDATING FEBRUARY 12, 1919, ARE BARRED, BECAUSE NOT BROUGHT WITHIN TWO YEARS.

The complaints in both cases were filed February 12, 1921. Therefore, under the doctrine of Phillips vs. Grand Trunk Ry., 236 U. S. 662, those arising prior to February 12, 1919, were barred by the two-year limitation contained in Section 16 of the Commerce Act. The two year bar was pleaded by the Steamship Company as to all claims arising prior to Federal control. The Director General did not plead the limitation as to those claims arising between the beginning of Federal control and February 12, 1919. But under the decisions of this court this is a defense which cannot be waived. In the Phillips case it was said at page 667: "Under such a statute the lapse of time not only bars the remedy but destroys the liability (Finn vs. U. S. 123 U. S., 227, 232), whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction." And again, "The obligation of the carrier to adhere to the legal rate, to refund only what is permitted by law and to treat all shippers alike would have made it illegal for the carriers, either by silence or by express waiver, to preserve to the Phillips Company a right of action which the statute required to be asserted within a fixed period. To have one period of limitation where the complaint is filed before the Commission and the varying periods of limitation of the different States, where a suit was brought in a court of competent jurisdiction; or to permit a Railroad Company to plead the Statute of Limitations as against some and to waive it as against others would be to pre-

fer some and discriminate against others in violation of the terms of the Commerce Act which forbids all devices by which such results may be accomplished."

The Circuit Court of Appeals in the cases at bar sought to differentiate the Phillips case on the ground that there another shipper had gone before the Commission and that Phillips could therefore claim no different limitation from that to which the other shipper was subject.

However, since the decision of the Circuit Court of Appeals, this court in Kansas City Sou. R. Co. vs. Wolf, decided February 19, 1923, 43 Supreme Court Reporter, 259, dismissed this distinction as untenable and applied the two-year limitation to all claims for violation of the Interstate Commerce Act, whether there was precedent application to the Commission by other shippers or otherwise.

But it is contended that Section 206 (f) of the Transportation Act reading as follows:

> "The period of Federal control shall not be computed as a part of the periods of limitation in actions against carriers or in claims for reparation to the Commission for causes of action arising prior to Federal control",

operated to toll the statute. Assuming this to be true, the claims antedating December 15, 1916, are still barred and a great many claims are involved in the action against the Steamship Company which moved prior to that date.

But the statute cannot, in our judgment, be given that effect. The Phillips and Wolf cases decided by this court hold that the lapse of two years destroys the

cause of action. The two-year period on all claims against the Steamship Company antedating federal control, and all claims against the Director General antedating February 28, 1918, had expired prior to the passage of the Transportation Act (February 28, 1920). The causes of action on such claims were therefore no longer existent at the time the Transportation Act was passed and Congress was powerless to revive them.

In Eberhart vs. U. S. 204 Fed. 884, a case in which an attempt was made to revive a cause of action which had been destroyed by lapse of time, the court observed at page 892:

> "The vice of the Act of 1911 is that it makes a new contract for these sureties where they had been for months before its enactment free from all liability to this bank, to the materialmen, and the laborers, a contract of which they had no notice, and to which they never assented, whereby they were made liable to the bank for $23,693.44. * * * This was done, if it was done at all, not by any process of law, but by the arbitrary act of a legislative body, without notice, trial, or hearing. An Act of Congress which has such an effect not only violates the fifth amendment to the Constitution, but is beyond the powers of the legislative department of a republican government, and void."

CONCLUSION.

Summarizing our contentions, they are as follows:

First: That in view of Section 15 of the Commerce Act providing that the Commission shall not have the right "to establish any route, classification, practice or rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this act shall be subject to the laws and regulations applicable to transportation by water", Section 4 of the act did not apply to the shipments involved in these cases, since they were wholly by water.

Second: All of the claims involved against the Director General are held by plaintiff under assignments from various shippers. Such assignments are void under Section 3477 Revised Statutes, and plaintiff has no cause of action.

Third: A part of the shipments involved in each case moved and charges were collected during the period that the Steamship Company's ships were being operated by the Shipping Board, and as to such shipments no liability can be fastened on either the Steamship Company or the Director General.

Fourth: No application to the Interstate Commerce Commission for relief was made on any of the claims involved in either action. The actions belong to the class of which the Interstate Commerce Commission has exclusive original jurisdiction. The Fourth Section is a statute relating to a form of discrimination and not merely one declaring the intermediate rate unlawful. It specifically provides that it shall not be construed as authority for charging the same rate to an

intermediate point as to the more distant point. Therefore, no court could find that the published rate to a more distant point was the rate which should have been charged to the intermediate point.

Fifth: Section 6 of the Commerce Act requires carriers to collect the rates published in their tariffs and forbids transportation, except when an applicable rate is contained in a published tariff. This section is supreme over those forbidding unreasonable, preferential and discriminatory rates.

Sixth: Discrimination may be removed by lowering one rate, raising the other, or changing both, and the only authority to direct the method by which the discrimination shall be removed in the absence of voluntary action by the carrier involved, is lodged in the Interstate Commerce Commission.

Seventh: A further administrative question is involved because North Portland is geographically a shorter distance from San Francisco by water than Portland, the route via Municipal Terminal No. 4 to North Portland is no longer than the route to Portland, and it is for the Commission to say whether a route which doubles back upon itself is a reasonable route.

Eighth: Section 10 of the Federal Control Act lodged exclusive jurisdiction of cases against the Director General arising out of the Interstate Commerce Act in the Interstate Commerce Commission.

Ninth: Section 206 (c) of the Transportation Act requires all actions against the Director General arising out of the Commerce Act brought after Federal control to be brought before the Commission.

Tenth: There was no violation of Section 4 because North Portland is geographically closer to San Francisco by water than Portland.

Eleventh: There was further no violation of the Fourth Section because in fact the carriers did not charge or receive more for transportation to North Portland than to Portland and Astoria. There were no shipments to North Portland, and no sum whatever was ever charged or received for any transportation to that point, although a paper rate was named in the joint water and rail tariff.

Twelfth: There was further no violation of the Fourth Section because the rates to Portland and Astoria were local rates of the Steamship Company and the Director General and the rates to North Portland were joint water and rail rates.

Thirteenth: The rates initiated and maintained by the Director General were under order of the President, and all statutes inconsistent with such orders were, by Section 10 of the Federal Control Act, made inapplicable to the Director General.

Fourteenth: If the rates be considered as violative of the Fourth Section, authority to continue them was given by the Commission's Fourth Section Order 7316.

Fifteenth: The rates charged after Federal control were made conclusively lawful by Section 208 (a) of the Transportation Act and the Steamship Company was forbidden to lower them during the six months' guaranty period.

Sixteenth: No damages were proven, the difference in rates not being the measure of damages.

Seventeenth: All claims antedating February 12, 1919, are barred because not brought within two years.

Respectfully submitted,

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